

# SJC

MASSACHUSETTS  
LAWYERS WEEKLY

September 21, 2009



This section contains summaries of all decisions rendered by the Supreme Judicial Court during its recently completed (though unofficial) "term" — which ran from Sept. 1, 2008, to Aug. 31, 2009. The full texts of SJC opinions are available at [www.masslawyers-weekly.com](http://www.masslawyers-weekly.com).

## ADMINISTRATIVE

### Regulations – Abandoned property

Where certain uncashed checks were issued by the plaintiff company, we hold that the definition of the phrase "outstanding credit balances" contained in regulations promulgated by former Treasurer Shannon O'Brien in 2001 apply to the uncashed checks for purposes of the abandoned property laws.

In so deciding, we reject a claim that amended regulations promulgated by Treasurer Timothy Cahill in 2004 could be applied retroactively here.

*Biogen IDEC MA, Inc. v. Treasurer and Receiver General* (Lawyers Weekly No. 10-117-09) (23 pages) (Spina, J.) Case heard by van Gestel, J., in the Superior Court. David A. Guberman for the defendant; Daniel W. Halston and Megan Barbero, both of Wilmer Cutler Pickering Hale and Dorr, for the plaintiff; Ben Robbins, Martin J. Newhouse and Jo Ann Shotwell Kaplan submitted a brief for New England Legal Foundation, et al., amici curiae (Docket No. SJC-10344) (July 2, 2009).

## APPEALS

### Condemnation – Access

Where (1) the city of Boston's inspection services department condemned a vacant dwelling, (2) a Superior Court judge ordered the department to allow the owner access to the premises during regular business hours and on one hour's notice, and to refrain from entering the premises, except in an emergency, without one business day's written notice and (3) dissatisfied with the access authorized by this order, the owner petitioned for relief, that request was correctly denied on the ground that review could adequately be obtained on appeal from any final adverse judgment in the trial court or by other available means.

*Dickey v. Inspectional Services Department of the City of Boston* (Lawyers Weekly No. 10-189-08) (2 pages) (Rescript) Petition heard by Botsford, J., sitting as single justice. James Dickey, pro se (Docket No. SJC-10285) (Nov. 7, 2008).

### Criminal complaint – Nolle prosequi

Where a petitioner sought relief from a single justice after a district attorney "nol prossed" a criminal case initiated by the petitioner, the single justice acted properly by denying relief based on a lack of standing.

*Carroll, petitioner* (Lawyers Weekly No. 10-022-09) (2 pages) (Rescript) Appealed from a decision by Ireland, J., sitting as single justice. Wendy J. Murphy for the petitioner (Docket No. SJC-10309) (Feb. 10, 2009).

### Denials of show cause applications – Inadequate record

Where a single justice denied a petitioner's request for an investigation into an allegation that 788 audio/video show cause applications the petitioner had filed in the Palmer Division of the District Court had been denied over a 28-year period without a hearing, the single justice acted permissibly in light of the petitioner's failure to present an adequate record.

*Budnick v. Palmer Division of the District Court Department, et al.* (Lawyers Weekly No. 10-094-09) (2 pages) (Rescript) Appealed from a decision issued by Spina, J., sitting as single justice. Thomas P. Budnick, pro se (Docket No. SJC-10322) (June 4, 2009).

### Disclaimers – Rescission

Where a plaintiff seeks rescission of two disclaimers of his interests in certain real property, the request must be denied because of the inadequacy of the record before this court.

*Breakiron v. Gudonis, et al.* (Lawyers Weekly No. 10-166-08) (2 pages) (Rescript) Case reported by Long, J., in the Land Court. John G. Fabiano and Marvin B. Bedingfield, both of Wilmer, Cutler, Pickering, Hale & Dorr, for the plaintiff (Docket No. SJC-10170) (Sept. 17, 2008).

### Dismissal of indictments

Where a single justice reversed a Superior Court judge's order dismissing in-

dictments against a defendant, the single justice committed no abuse of discretion and thus his ruling should be affirmed.

*Commonwealth v. Clark* (Lawyers Weekly No. 10-091-09) (3 pages) (Rescript) Petition heard by Greaney, J., sitting as single justice. Brad P. Bennion and Dana Alan Curhan for the defendant; Alexei Tymoczko and Matthew McDonough for the commonwealth (Docket No. SJC-10220) (May 28, 2009).

### G.L.c. 211, §3

Where a single justice denied a petitioner's request for relief pursuant to G.L.c. 211, §3, the single justice acted permissibly, as the petitioner had an adequate alternative remedy.

*Englehart v. Commissioner of Correction, et al.* (Lawyers Weekly No. 10-023-09) (2 pages) (Rescript) Appealed from a decision issued by Greaney, J., sitting as single justice. William Englehart, pro se; David Slade for the defendants (Docket No. SJC-10328) (Feb. 10, 2009).

### G.L.c. 211, §3

Where a plaintiff filed a petition with a single justice pursuant to G.L.c. 211, §3, the single justice rightly denied the petition in light of the availability of another adequate and effective avenue for seeking relief.

*Bedell v. Bedell, et al.* (Lawyers Weekly No. 10-167-08) (2 pages) (Rescript) Appealed from a decision issued by Cordy, J., sitting as single justice. Patricia S. Johnstone, of Schlichte, Johnstone & Henry, and David

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## APPEALS

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*S. Smith, of Ouellette & Smith, for the plaintiff; Mary P. Harrington, of Ronan, Segal & Harrington, for the defendants (Docket No. SJC-10137) (Sept. 17, 2008).*

### G.L.c. 211, §3

Where a petitioner appeals from a judgment of a single justice of this court denying his petition for relief pursuant to G.L.c. 211, §3 and G.L.c. 249, §4, the appeal must be rejected as meritless.

“The petitioner, a frequent litigant in the Massachusetts appellate courts, raises numerous claims arising from a series of G.L.c. 209A orders issued by the District Court more than a decade ago. The petitioner has offered no supporting material for his claims, largely, as he concedes, because of the age of the claims — they arise from orders entered in the District Court in 1995. . . . To the extent that he claims the District Court has failed to provide him with materials from his underlying cases, even those claims are made without support. . . . We have been presented with no basis to conclude that the single justice abused his discretion or otherwise erred.”

*Watson v. Justices of the Dorchester Division of the District Court Department, et al. (Lawyers Weekly No. 10-200-08) (1 page) (Rescript) Appealed from a decision by Cordy, J., sitting as single justice. Lawrence Watson, pro se (Docket No. SJC-09775) (Nov. 24, 2008).*

### G.L.c. 211, §3

Where the petitioner appealed to a single justice a clerk-magistrate’s failure to take certain actions, the single justice acted permissibly in denying the petitioner relief, as the petitioner neglected to take the proper steps in the trial court to rectify some of the alleged errors and has relief available through means other than a petition under G.L.c. 211, §3 to remedy another alleged error.

*Watson v. Clerk-Magistrate of the Dorchester Division of the District Court Department (Lawyers Weekly No. 10-029-09) (2 pages) (Rescript) Appealed from a decision issued by Cordy, J., sitting as single justice. Lawrence Watson, pro se; Annapurna Balakrishna for the defendant (Docket No. SJC-10265) (Feb. 20, 2009).*

### G.L.c. 211, §3

Where a petitioner appeals from a judgment of a single justice of this court denying his request for relief pursuant to G.L.c. 211, §3 and G.L.c. 249, §4, the appeal must fail, as the brief the petitioner submitted neither addresses any of the issues raised in the petition that he filed in the county court, nor presents any argument that the single justice abused his discretion or otherwise erred.

*Watson v. Clerk-Magistrate of the Dorchester Division of the District Court Department (Lawyers Weekly No. 10-201-08) (1 page) (Rescript) Appealed from a decision by Ireland, J., sitting as single justice. Lawrence Watson, pro se; Annapurna Balakrishna for the defendant (Docket No. SJC-10037) (Nov. 24, 2008).*

### G.L.c. 211, §3

Where an individual petitioned to a single justice after receiving unfavorable decisions in the trial court and Appeals Court in a contract case, the single justice acted properly in denying the plaintiff’s petition as she was unentitled to relief under G.L.c. 211, §3.

*Onyeagoro v. E.T. Engineering Enterprises, Inc. (Lawyers Weekly No. 10-077-09) (2 pages) (Rescript) Appealed from a judgment entered by Spina, J., sitting as single justice. Pauline A. Onyeagoro, pro se; Michael G. Sites submitted a brief for the defendant (Docket No. SJC-10323) (May 7, 2009).*

### G.L.c. 211, §3

Where a single justice denied a petition for relief pursuant to G.L.c. 211, §3, an appeal filed by the petitioner must fail, as she is not entitled to extraordinary review under our superintendence power.

*Singer v. Rosenkranz (and a consolidated case) (Lawyers Weekly No. 10-050-09) (4 pages) (Rescript) Appealed from decisions by Spina, J. sitting as single justice. Sandra Singer, pro se; Alan B. Rindler and Shana M. Solomon, both of Rindler Morgan, for the defendant (Docket No. SJC-09865) (March 23, 2009).*

### G.L.c. 211, §3 - Challenge to denial of dismissal motion

Where a single justice denied an individual’s petition for relief under G.L.c. 211, §3, the single justice acted permissibly, as other adequate alternative means were available through which the petitioner could appeal a denial of his motion to dismiss criminal charges lodged against him.

*Fitzpatrick v. Commonwealth (Lawyers Weekly No. 10-065-09) (3 pages) (Rescript) Appealed from a decision issued by Greaney, J., sitting as single justice. Charles W. Groce III for the petitioner (Docket No. SJC-10353) (April 21, 2009).*

## Justice John M. Greaney



**Appointed to SJC:** 1989

**Retired:** December 2008

**Majority opinions written this year:** 5

**Concurrences joined in:** 2

**Notable decision:** *Commerce Insurance Company v. Ultimate Livery Service, Inc.* (Lawyers Weekly No. 10-204-08), which held that a private carrier for hire, which permitted a passenger to consume alcoholic beverages (not

purchased or supplied by the carrier) while traveling in one of its vehicles, could be held liable for a death and serious personal injuries caused shortly thereafter by the passenger’s negligent operation of a motor vehicle while under the influence of alcohol

### G.L.c. 211, §3 - Child support orders

Where a single justice denied a petitioner’s request for relief under G.L.c. 211, §3 from certain child support orders and related interest and penalties, the single justice acted correctly, as the petitioner was improperly attempting to relitigate matters that he had unsuccessfully sought to challenge in earlier proceedings.

*Davidson v. Register of Probate for Essex County, et al. (Lawyers Weekly No. 10-109-09) (2 pages) (Rescript) Appealed from a decision issued by Cordy, J., sitting as single justice. Phillip A. Davidson, pro se (Docket No. SJC-10434) (June 19, 2009).*

### G.L.c. 211, §3 - Contempt

Where a petitioner sought relief from a summons compelling his attendance at a contempt proceeding in Superior Court, a single justice acted correctly by denying the petition pursuant to S.J.C. Rule 2:21.

*Strahan v. Superior Court Department of the Trial Court for the County of Suffolk, et al. (Lawyers Weekly No. 10-186-08) (2 pages) (Rescript) Petition heard by Ireland, J., sitting as single justice. Richard Max Strahan, pro se; Martin M. Fantozzi and Michael S. Rabieh, both of Goulston & Storrs, for BP Prucenter Acquisition, LLC (Docket No. SJC-09829) (Nov. 7, 2008).*

### G.L.c. 211, §3 - Default

Where (1) a petitioner commenced a civil action in the Superior Court against various city of Boston defendants, claim-

ing employment discrimination in connection with his termination from a teaching position, (2) the defendants were defaulted, (3) the defendants thereafter moved successfully to set aside the entry of default, (4) the petitioner then moved unsuccessfully for reconsideration of the order setting aside the default and (5) the petitioner eventually sought relief from a single justice pursuant to G.L.c. 211, §3, the single justice neither abused his discretion nor otherwise erred in denying the petition.

“As the single justice properly concluded, [Roy] Owens ‘has an adequate remedy in the normal appellate process.’ His case is still active in the Superior Court, and he can raise his claims in an appeal after a final judgment. . . .”

*Owens v. City of Boston, et al. (Lawyers Weekly No. 10-199-08) (2 pages) (Rescript) Appealed from a decision by Spina, J., sitting as single justice. Roy Owens, pro se; Cathleen Collins and Jill M. Murray for the city of Boston and others (Docket No. SJC-10073) (Nov. 24, 2008).*

### G.L.c. 211, §3 - Double jeopardy

Where a defendant filed a petition for relief under G.L.c. 211, §3 after he was convicted of breaking and entering in the daytime with intent to commit a felony, the pe-

sitting as single justice. Mark B. Morse for the petitioners; Kally Walsh for the father (Docket No. SJC-10478) (Aug. 19, 2009).

### G.L.c. 211, §3 - Moot question

Where (1) a trial judge ruled that an individual would not be permitted to hold a Bible during his criminal trial and (2) a single justice of the Supreme Judicial Court denied the individual relief pursuant to G.L.c. 211, §3, we hold that an appeal by the individual of the single justice’s ruling must be denied as moot in that the individual’s criminal trial has concluded.

*Martin v. Commonwealth (Lawyers Weekly No. 10-210-08) (2 pages) (Rescript) Appealed from a decision issued by Ireland, J., sitting as single justice. Beth L. Eisenberg for the petitioner (Docket No. SJC-10302) (Dec. 9, 2008).*

### G.L.c. 211, §3 - Mootness

Where a single justice denied the petitioner’s request for relief pursuant to G.L.c. 211, §3, the judge acted permissibly in doing so on mootness grounds.

*Ewing v. Commonwealth (Lawyers Weekly No. 10-139-09) (2 pages) (Rescript) Appealed from a decision issued by Botsford, J., sitting as single justice. Shannon Ewing, pro se, (Docket No. SJC-10489) (Aug. 5, 2009).*

### G.L.c. 211, §3 - Police abuse allegation

Where a single justice rejected a petition for relief presented under G.L.c. 211, §3, by the plaintiff in a case alleging police abuse, the single justice committed no abuse of discretion or error of law.

*Owens v. City of Boston (Lawyers Weekly No. 10-179-08) (2 pages) (Rescript) Appealed from a judgment entered by Greaney, J., sitting as single justice. Roy Owens, pro se; Nicole Murati Ferrer for the defendants (Docket No. SJC-09987) (Oct. 29, 2008).*

### G.L.c. 211, §3 - Retrial

Where (1) a petitioner was convicted of first-degree murder, armed assault in a dwelling and armed burglary and acquitted of armed robbery, (2) we vacated the conviction and ordered a new trial, (3) on remand, the petitioner moved to dismiss on collateral estoppel and double jeopardy grounds and (4) when that motion was denied, he filed a G.L.c. 211, §3 petition seeking relief, a single justice did not err in denying the petition, as the petitioner’s substantive rights have not been violated.

*Conkey v. Commonwealth (Lawyers Weekly No. 10-198-08) (4 pages) (Rescript) Appealed from a decision by Spina, J., sitting as single justice. Bernard Grossberg and Victoria Kelleher for the plaintiff; Loretta M. Lillios for the commonwealth (Docket No. SJC-10091) (Nov. 24, 2008).*

### G.L.c. 211, §3 - Sealing of records

Where a petitioner sought relief pursuant to G.L.c. 211, §3 after his request to seal court records was denied, an order denying the petition for relief was proper given the failure of the petitioner to show a lack of other adequate appellate avenues.

*Dempsey v. Clerk of the Superior Court for Criminal Business in Suffolk County, et al. (Lawyers Weekly No. 10-138-09) (2 pages) (Rescript) Petition heard by Botsford, J., sitting as single justice. John B. Dempsey, pro se (Docket No. SJC-10475) (Aug. 5, 2009).*

### G.L.c. 211, §3 - Survey

Where a murder defendant petitioned to a single justice, pursuant to G.L.c. 211, §3, after a Superior Court judge refused to compel all city and town clerks to respond to a survey the petitioner had created, the single justice acted permissibly in denying the petition as no showing was

tion was correctly denied on the ground that the prosecution did not violate the defendant’s double jeopardy rights.

*Solomon v. Commonwealth (Lawyers Weekly No. 10-071-09) (4 pages) (Rescript) Petition heard by Cordy, J., sitting as single justice. David Solomon, pro se; Jessica Noble for the commonwealth (Docket No. SJC-10276) (April 30, 2009).*

### G.L.c. 211, §3 - Double jeopardy

Where a criminal defendant filed a G.L.c. 211, §3 petition to bar his retrial, the petition was correctly denied on the ground that double jeopardy principles would not be violated should the commonwealth retry the defendant.

*Campagna v. Commonwealth (Lawyers Weekly No. 10-106-09) (3 pages) (Rescript) Petition heard by Cordy, J., sitting as single justice. James F. Petersen and Joseph A. Pieropan for the commonwealth; John M. Thompson, of Thompson & Thompson, for the plaintiff (Docket No. SJC-10275) (June 18, 2009).*

### G.L.c. 211, §3 - Foster parents

Where the former foster parents of a minor child filed a G.L.c. 211, §3 petition after their request to intervene in a guardianship proceeding was denied, the petition was correctly denied on the ground that adequate alternative remedies existed.

*Care and Protection of Rae (Lawyers Weekly No. 10-146-09) (2 pages) (Rescript) Appealed from a decision by Botsford, J.,*

made by the petitioner that he lacked an adequate alternative remedy.

*Murrell v. Commonwealth* (Lawyers Weekly No. 10-147-09) (2 pages) (Rescript) *Appealed from a judgment issued by Ireland, J., sitting as single justice. Chauncey B. Wood, of Wood & Nathanson, for the defendant* (Docket No. SJC-10468) (Aug. 20, 2009).

## G.L.c. 211, §3 - Transcript request

Where a single justice denied a petition filed pursuant to G.L.c. 211, §3, through which an individual sought to challenge a trial judge's rejection of a request for a free transcript, the single justice acted permissibly, as the petitioner had an adequate alternative means for seeking relief.

*Donald v. Commonwealth* (Lawyers Weekly No. 10-211-08) (2 pages) (Rescript) *Appealed from a decision issued by Ireland, J., sitting as single justice. Stanley L. Donald, pro se* (Docket No. SJC-10311) (Dec. 9, 2008).

## G.L.c. 211, §3 petition

Where a petitioner convicted of first-degree murder sought relief pursuant to G.L.c. 211, §3, a single justice correctly denied the petition on the ground that the petitioner had an adequate alternative to relief under G.L.c. 211, §3.

"... The issues he raised in his petition could have, and should have, been raised in a motion for a new trial in the trial court. To the extent that the issues were raised in any of his postconviction motions, [Raymond P.] Vinnie could have sought leave to appeal from the denial of each motion pursuant to the gatekeeper provision of G.L.c. 278, §33E. The single justice did not abuse her discretion or commit any other error of law in denying relief."

*Vinnie v. Commonwealth* (Lawyers Weekly No. 10-133-09) (2 pages) (Rescript) *Appealed from a decision by Botsford, J., sitting as single justice. Raymond P. Vinnie, pro se* (Docket No. SJC-10497) (July 31, 2009).

## G.L.c. 211, §3 petition

Where a G.L.c. 211, §3 petition was filed by a murder defendant whose request for information regarding a commonwealth witness was denied, the petition lacks merit given the availability of other means of relief.

*Ayala v. Commonwealth* (Lawyers Weekly No. 10-134-09) (2 pages) (Rescript) *Appealed from a decision by Botsford, J., sitting as single justice. Greg T. Schubert for the petitioner* (Docket No. SJC-10483) (July 31, 2009).

## G.L.c. 211, §3 petition - Discovery

Where (1) a petitioner, who was injured when a high voltage electric utility transmission power line fell onto him, brought a personal injury action along with his wife (the co-petitioner), (2) a Superior Court judge ordered production of certain investigatory materials concerning the incident, (3) an Appeals Court single justice modified the Superior Court judge's order and (4) the petitioners thereafter sought relief pursuant to G.L.c. 211, §3, an order denying the petition must be affirmed, as the petitioners have failed to persuade us that the discovery order at issue could not adequately be reviewed on appeal from any final adverse judgment.

*Cataldo, et al. v. National Grid USA, et al.* (Lawyers Weekly No. 10-187-08) (2 pages) (Rescript) *Appealed from a decision by Cordy, J., sitting as single justice. Jeffrey B. Renton and Edward J. Denn, both of Gilbert & Renton, for the petitioners* (Docket No. SJC-10266) (Nov. 7, 2008).

## G.L.c. 274, §4 defense

Where a defendant, indicted as an accessory after the fact to murder, has petitioned for review of a single justice's order denying the defendant's request for relief

from the trial judge's decision to deny his motion for leave to raise at trial a defense based on G.L.c. 274, §4, the petition must be dismissed because adequate review could be had through other avenues.

*Heang v. Commonwealth* (Lawyers Weekly No. 10-110-09) (3 pages) (Rescript) *Appealed from a decision by Spina, J., sitting as single justice. Willie J. Davis, of Davis, Robinson & White, for the defendant* (Docket No. SJC-10408) (June 19, 2009).

## Gatekeeper provision

Where a convicted murderer sought leave to appeal pursuant to the gatekeeper provision of G.L.c. 278, §33E, a single justice's order denying that request must be affirmed.

"As we have said many times, 'the decision of the single justice, acting as a gatekeeper pursuant to G.L.c. 278, §33E, is "final and unreviewable." ... This rule would bar [George H.] Nassar's appeal in any event, but it applies with particular force in this case, where Nassar is seeking for the second time to appeal from a decision that is more than twenty-five years old."

*Commonwealth v. Nassar* (Lawyers Weekly No. 10-107-09) (3 pages) (Rescript) *Appealed from a decision by Spina, J., sitting as single justice. Claudia Leis Bolgen, of Bolgen & Bolgen, for the defendant; Kenneth E. Steinfield for the commonwealth* (Docket No. SJC-10349) (June 18, 2009).

## Mandamus - Criminal file

Where a petitioner, convicted in 2003 of several offenses, filed a petition for relief in the nature of mandamus, seeking an order that the Essex County district attorney's office and its agents produce the file and certain discovery from his criminal case, the petition was correctly denied, as the petitioner has not established any entitlement to mandamus relief.

*Montefusco v. Commonwealth* (Lawyers Weekly No. 10-180-08) (3 pages) (Rescript) *Appealed from a decision by Greaney, J., sitting as single justice. Carlo R. Montefusco, pro se; Catherine Langevin Semel for the commonwealth* (Docket No. SJC-10218) (Oct. 29, 2008).

## Mootness

Where a single justice of this court denied a defendant's request for a stay of the remainder of his criminal sentence, the defendant's appeal from that ruling must be dismissed as moot given that the sentence has expired and the defendant has been released from custody.

*Hendricks v. Commonwealth* (Lawyers Weekly No. 10-008-09) (1 page) (Rescript) *Appealed from a decision by Ireland, J., sitting as single justice. Thomas Hendricks, pro se; Julia K. Holler for the commonwealth* (Docket No. SJC-10306) (Jan. 9, 2009).

## Motion to dismiss criminal charges

Where a petitioner sought G.L.c. 211, §3 relief after his motion to dismiss a criminal charge was denied, a single justice permissibly denied the petition for relief, as the denial of the dismissal motion is not appealable.

*Chubbuck v. Commonwealth* (Lawyers Weekly No. 10-070-09) (3 pages) (Rescript) *Petition heard by Ireland, J., sitting as single justice. Adriana Contartese for the petitioner; Peter Maguire for the commonwealth* (Docket No. 10190) (April 28, 2009).

## Single justice ruling - Offer of bond

Where (1) a medical malpractice tribunal ruled that a defendant had presented sufficient question of liability appropriate for judicial inquiry and thus could proceed without filing a bond and (2) a single justice denying the petitioner's appeal of that decision, we hold that the single justice's decision should stand.

*Giamarco v. Ruggiero* (Lawyers Weekly No. 10-149-09) (2 pages) (Rescript) *Appeals Court* *Appealed from a decision issued by Botsford, J., sitting as single justice. Stephen M. O'Shea, of Martin Magnuson McCarthy & Kenney, for the petitioner* (Docket No. SJC-10490) (Aug. 24, 2009).

## Witness - Sequestration

Where a potential witness at a murder trial sought relief from an order of the trial judge sequestering him from the courtroom, the appeal must be dismissed as moot.

*Flaherty, petitioner* (Lawyers Weekly No. 10-188-08) (1 page) (Rescript) *Appealed from a decision by Botsford, J., sitting as single justice. Wendy J. Murphy for the petitioner; Meghan E. O'Neill for the commonwealth* (Docket No. SJC-10283) (Nov. 7, 2008).

## ARBITRATION

### CBA - Discrimination

Where arbitrators in two cases found that the Massachusetts Bay Transportation Authority, in acting to remediate its own perceived illegal discrimination, violated the terms of a collective bargaining agreement, one of the arbitration awards should be affirmed and the other reversed.

*Massachusetts Bay Transportation Authority v. Boston Carmen's Union, Local 589, Amalgamated Transit Union* (and a companion case) (Lawyers Weekly No. 10-095-09) (24 pages) (Spina, J.) *Cases heard by Kottmyer, J., on motions for summary judgment. Mary Jo Harris and Philip G. Boyle, both of Morgan, Brown & Joy, for the plaintiff; Douglas Taylor for the defendant* (Docket No. SJC-10291) (June 4, 2009).

### G.L.c. 151B - Employment agreement

Where (1) a plaintiff, formerly chief of anesthesiology at the defendant hospital, brought suit alleging gender-based discrimination and retaliation in violation of G.L.c. 151B, as well as factually related common-law claims, and (2) the defendant moved to compel arbitration under the plaintiff's employment agreement, the motion was correctly denied because the agreement did not expressly waive the plaintiff's G.L.c. 151B remedies.

*Warfield v. Beth Israel Deaconess Medical Center, Inc., et al.* (Lawyers Weekly No. 10-129-09) (24 pages) (Botsford, J.) (Cowan, J., dissenting) *Motions to dismiss and to compel arbitration heard by Borenstein, J., in Superior Court. John F. Welsh and Jennifer Belli, both of Bello, Black & Welsh, for Beth Israel Deaconess Medical Center, Inc.; Tracey E. Spruce, of Dalton & Finegold, for Harvard Medical Faculty Physicians at Beth Israel Deaconess Medical Center, Inc.; Richard D. Glovsky, of Prince, Lobel, Glovsky & Tye, for Josef E. Fischer; Ellen J. Zucker and Laura R. Studen, both of Burns & Levinson, for the plaintiff; Ben Robbins, Martin J. Newhouse and Jo Ann*

*Shotwell Kaplan, for New England Legal Foundation & another, amici curiae, submitted a brief; Patricia A. Washienko, of Wagner, Cook, Freiberger & Washienko, for American Civil Liberties Union of Massachusetts and others, amici curiae, submitted a brief* (Docket No. SJC-10375) (July 27, 2009).

## ATTORNEYS

### Bar admission - Moral character

Where the Board of Bar Overseers has found that an applicant for admission to the bar was not qualified, the Board's decision should be upheld in light of the applicant's failure to show that at this time he possesses the necessary qualifications to practice law in the commonwealth.

*Desy v. Board of Bar Examiners* (Lawyers Weekly No. 10-173-08) (4 pages) (Rescript) *Appealed from a decision by Cordy, J., sitting as single justice. Louis Desy Jr., pro se; Katy E. Koski and Jessica G. Gray, both of Sherin & Lodgen, for the Board of Bar Examiners* (Docket No. SJC-10069) (Oct. 20, 2008).

### Discipline - Misuse of client funds

Where a single justice of the present court has ordered an attorney indefinitely suspended from the practice of law, we conclude that the suspension order should be affirmed (1) because it is supported by evidence that the attorney intentionally misused client funds and (2) because the attorney has not proved his allegation that the Board of Bar Overseers (which originally recommended the indefinite suspension) improperly considered his Nigerian national origin against him.

*In the Matter of: Osagiede, Osamwonyi Ehi* (Lawyers Weekly No. 10-012-09) (5 pages) (Rescript) *Appealed from a decision issued by Judith A. Cowin, J., sitting as single justice. Edward S. Cheng and Courtney A. Clark, both of Sherin & Lodgen, for the respondent; John W. Marshall, First Assistant Bar Counsel* (Docket No. SJC-10230) (Jan. 15, 2009).

### Discipline - Suspension

Where the Board of Bar Overseers has recommended a public reprimand for an attorney who made misrepresentations to the Probate & Family Court, this court finds that the attorney should instead be suspended for one month.

*In the Matter of: Angwafo, Stella B.* (Lawyers Weekly No. 10-006-09) (17 pages) (Spina, J.) *Case reported by Greaney, J., sitting as single justice. John W. Marshall, First Assistant Bar Counsel; Martin R. Rosenthal for the respondent* (Docket No. SJC-10171) (Jan. 9, 2009).

### Law firm - Withdrawal of partner

Where plaintiff attorneys who left the employ of the defendant law firm claim that a provision in the firm's partnership agreement, imposing adverse consequences on any "withdrawing partner," is unenforceable, that claim must be rejected, as the provision does not contravene the Massachusetts Rules of Professional Conduct.

*Pierce, et al. v. Morrison Mahoney LLP* (and two companion cases) (Lawyers Weekly No. 10-207-08) (20 pages) (Cordy, J.) *Motions for summary judgment were heard by Charles R. Johnson, J., sitting under statutory authority in Superior Court. Timothy J. Dacey and Derek B. Domian, both of Goulston & Storrs, and Robert A. Curley Jr., of Curley & Curley, for Morrison Mahoney LLP; Anthony M. Doniger and Andrew R. Levin, both of Sugarman, Rogers, Barshak & Cohen, for Joel F. Pierce and others; William A. Worth, of Prince, Lobel, Glovsky & Tye, for Mitchell S. King, was present but did not argue; Alice Olsen*

## ATTORNEYS

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Mann, pro se, submitted a brief (Docket No. SJC-10172) (Dec. 9, 2008).

### Lien - Patent prosecution

Where the 1st U.S. Circuit Court of Appeals has asked this court whether the Massachusetts attorney's lien statute applies to patent prosecution work, we find that it does.

*Ropes & Gray LLP v. Jalbert* (Lawyers Weekly No. 10-130-09) (15 pages) (Spina, J.) Certification of questions of law to the Supreme Judicial Court by the United States Court of Appeals for the First Circuit. D. Ross Martin and C. Thomas Brown, both of Ropes & Gray, for the plaintiff; Andrew Z. Schwartz and Joshua S. Pemstein, both of Foley Hoag, for the defendant; Erik Paul Belt, of Bromberg & Sunstein, and Robert M. Abrahamsen, Michael A. Albert and Eric G.J. Kaviar, all of Wolf Greenfield & Sacks, for the Boston Patent Law Association, amicus curiae, submitted a brief (Docket No. SJC-10333) (July 28, 2009).

### Privilege - Client's threats

Where (1) a client left messages on his counsel's telephone answering machine threatening to harm others, (2) the attorney disclosed those communications in order to protect those threatened and (3) following the issuance of a criminal complaint against the client, the commonwealth sought to compel the attorney to testify before the grand jury regarding the answering machine messages, the commonwealth's request must be denied on the ground that the messages are privileged.

*In the Matter of a Grand Jury Investigation* (Lawyers Weekly No. 10-049-09) (10 pages) (Spina, J.) Case reported by McCann, J., in Superior Court. John M. Goggin for the attorney; Jane A. Sullivan for the commonwealth (Docket No. SJC-10173) (March 23, 2009).

### Reciprocal discipline

Where an attorney licensed to practice in Massachusetts has been disbarred based on a disbarment order issued by the District of Columbia board of professional responsibility, we find no error in the imposition of reciprocal discipline.

"Because [Peter Paul] Mitrano received a fair hearing in the District of Columbia and the findings are supported by sufficient evidence, the District of Columbia's judgment of disbarment constitutes conclusive evidence of Mitrano's misconduct. S.J.C. Rule 4:01, §16(3)."

*In the Matter of: Mitrano, Peter Paul* (Lawyers Weekly No. 10-090-09) (3 pages) (Rescript) Appealed from a decision by Cordy, J., sitting as single justice. Peter Paul Mitrano, pro se; Nancy E. Kaufman, First Assistant Bar Counsel (Docket Nos. SJC-10201 and 10366) (May 22, 2009).

### Reciprocal discipline - Resignation

Where an attorney resigned from the practice of law in Connecticut during the pendency of a bar discipline proceeding, he is subject to reciprocal discipline in Massachusetts pursuant to S.J.C. Rule 4:01, §16 despite the fact that the resignation was not accompanied by an admission or finding of misconduct.

*In the Matter of Ngoben, Paul Mpande* (Lawyers Weekly No. 10-026-09) (16 pages) (Botsford, J.) Case reported by Greaney, J., sitting as single justice. Nancy E. Kaufman, Assistant Bar Counsel; Paul Mpande Ngoben, pro se (Docket No. SJC-10178) (Feb. 13, 2009).

### Suspension - False testimony

Where the Board of Bar Overseers has recommended a public reprimand for an

attorney who in 2005 gave false testimony at the criminal trial of her assailant in Tennessee, we hold that the attorney should instead be suspended for six months.

*In the Matter of Balliro, Fawn* (Lawyers Weekly No. 10-011-09) (21 pages) (Spina, J.) Case reported by Cordy, J., sitting as single justice. Constance V. Vecchione, Bar Counsel; Camille F. Sarrouf, of Sarrouf Corso, and Arnold R. Rosenfeld, of K&L Gates, for the respondent; Andrew N. Nathanson and Marbree D. Sullivan, both of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, for The National Network to End Domestic Violence and another, amici curiae, submitted a brief (Docket No. SJC-10217) (Jan. 15, 2009).

### Suspension - Misappropriation

Where a single justice ordered an attorney indefinitely suspended from the practice of law, that order should be af-

## Chief Justice Margaret H. Marshall



Appointed to SJC: 1996 (elevated to chief, 1999)

Will reach retirement age: 2014

Majority opinions written this year: 21

Concurring in part, dissenting in part opinions written: 1

Concurrences joined in: 2

Concurring in the judgment opinions joined in: 1

Dissents joined in: 3

**Notable decision:** *Feeney, et al. v. Dell Inc., et al.* (Lawyers Weekly No. 10-118-09), in which the Supreme Judicial Court ruled that a provision in a consumer contract — compelling individual arbitration and stating that it foreclosed a statutory right to participate in class action lawsuits — was not enforceable because it is contrary to the fundamental public policy of the commonwealth favoring consumer class actions under G.L.c. 93A

firmed based on the attorney's misappropriation of client funds.

*In the Matter of: Johnson, Gale Rosalyn* (Lawyers Weekly No. 10-168-08) (4 pages) (Rescript) Appealed from a decision by Greaney, J., sitting as single justice. Lester E. Riordan III for the respondent; Constance V. Vecchione, Bar Counsel (Docket No. SJC-10096) (Sept. 18, 2008).

### Waiver of bar examination eligibility rule

Where a plaintiff (1) is a 2004 graduate of a wholly online law school authorized by the state of California to grant the juris doctor degree and (2) is a member of the California bar, having taken and passed that state's bar examination in 2004, we hold that because of particular circumstances in this case, he should be granted a waiver of S.J.C. Rule 3:01, §3.3, and be allowed to sit for the Massachusetts bar examination.

*Mitchell v. Board of Bar Examiners* (Lawyers Weekly No. 10-195-08) (16 pages) (Botsford, J.) (Ireland, J., dissenting) Case reported by Spina, J., sitting as single justice. Ross E. Mitchell, pro se; David A. Guberman for the Board of Bar Examiners (Docket No. SJC-10157) (Nov. 20, 2008).

### Work product - Corporate counsel - Outside tax accountants

Where the Commissioner of Revenue requested production of communications between an in-house corporate counsel and outside tax accountants consulted by him regarding the structuring of a sale of stock mandated by an antitrust consent judgment, an order denying the

Commissioner's request should be affirmed on the ground that the documents are protected from disclosure by the work-product doctrine.

*Commissioner of Revenue v. Comcast Corp., et al.* (Lawyers Weekly No. 10-033-09) (37 pages) (Marshall, C.J.) Motions to compel production of certain withheld documents and for reconsideration heard by Gaziano, J., and entry of final judgment ordered by Connolly, J., in Superior Court. William W. Porter for the plaintiff; David J. Nagle, of Sullivan & Worcester, for the defendants; John S. Brown, George P. Mair, Donald-Bruce Abrams and Matthew D. Schnell, all of Bingham McCutchen, submitted a brief for The New England Cable & Telecommunications Association, Inc., amicus curiae; Shirley K. Sicilian and Sheldon H. Laskin, for Multistate Tax Commission, amicus curiae, submitted a brief (Docket No. SJC-10209) (March 3, 2009).

*Meagher & Flom, for Fremont Investment & Loan; Christopher K. Barry-Smith, John M. Stephan and Jean M. Healey for the commonwealth; the following submitted briefs for amicus curiae: Richard F. Hans and John P. Doherty for the American Securitization Forum and another; Jo Ann Shotwell Kaplan, Martin J. Newhouse and John Pagliaro for New England Legal Foundation and another; Stuart T. Rossman, Daniel Mosteller, Melissa Briggs, Matthew Brinegar, Jean Constantine-Davis, Nina F. Simon, Michael R. Schuster, Tara Twomey and Ira Rheingold for National Consumer Law Center and others; Paul Collier & Max Weinstein for WilmerHale Legal Services Center of Harvard Law School; Robert B. Serino, Matthew P. Previn and Kirk D. Jensen for American Financial Services Association and others* (Docket No. SJC-10258) (Dec. 9, 2008).

## CIVIL PRACTICE

### Claim preclusion

Where a single justice dismissed a plaintiff's complaint for injunctive and declaratory relief, the single justice acted permissibly on the basis of the doctrine of claim preclusion.

*Tynan, et al. v. Attorney General, et al.* (Lawyers Weekly No. 10-017-09) (2 pages) (Rescript) Appealed from a dismissal ordered by Cordy, J., sitting as single justice. Charles F. Tynan, pro se; Peter Sacks for the defendants (Docket No. SJC-10253) (Jan. 29, 2009).

### Sex offender - Composition of Registry Board

Where a plaintiff classified as a level-three sex offender has challenged that classification, his appeal must fail despite the fact that the composition of the seven-member Sex Offender Registry Board failed to include, as required by the Board's governing regulatory statute, G.L.c. 6, §178K, two licensed psychologists or psychiatrists who have special expertise in the assessment and evaluation of sex offenders and knowledge of the forensic mental health system.

*Doe, Sex Offender Registry Board No. 15606 v. Sex Offender Registry Board* (Lawyers Weekly No. 10-215-08) (17 pages) (Greaney, J.) Case heard by Rup, J., in Superior Court. Stephen R. Kaplan for the plaintiff; David L. Chenail for the defendant (Docket No. SJC-10199) (Dec. 12, 2008).

### Sex offender - Funds to retain expert

Where an indigent plaintiff, who has been classified as a level-two sex offender, claims that the Sex Offender Registry Board erred by denying his motion for funds to retain an expert witness under G.L.c. 6, §178L(1), a remand must be ordered, as §178L(1) gives the Board discretion to grant a motion for funds filed by an indigent sex offender in a case such as the present one, even though the Board itself does not intend to rely on the testimony or report of an expert witness.

*Doe, Sex Offender Registry Board No. 89230 v. Sex Offender Registry Board* (Lawyers Weekly No. 10-214-08) (27 pages) (Botsford, J.) (Spina, J., with whom Greaney and Ireland, JJ., join, concurring) Motions for judgment on the pleadings and for funds to retain an expert witness heard by Quinlan, J., in Superior Court. Brandon L. Campbell for the plaintiff; William H. Burke for the defendant; Larni S. Levy, Murray Kohn, Michael Nam-Krane and Pasqua Scibelli, for Committee for Public Counsel Services, amicus curiae, submitted a brief (Docket No. SJC-10086) (Dec. 12, 2008).

## BANKS AND BANKING

### Negligent misrepresentation

Where, in a check collection case heard in the Boston Municipal Court, a defendant bank was found liable on a count of negligent misrepresentation, that judgment will be allowed to stand only because the defendant waived any claim of error when it failed to appeal from that judgment to the Appellate Division.

*Gossels v. Fleet National Bank* (Lawyers Weekly No. 10-040-09) (15 pages) (Cordy, J.) Case heard by Kelly, J., in the Boston Municipal Court. S. Elaine McChesney and Jason L. Watkins, both of Bingham McCutchen, for the defendant; C. Peter R. Gossels, of Weston Patrick, pro se; Brenda R. Sharton, Dahlia S. Fetouh and Dennis N. D'Angelo, all of Goodwin Procter, submitted a brief for Massachusetts Bankers Association, Inc., amicus curiae (Docket No. SJC-10186) (March 12, 2009).

### 'Subprime' loans - Foreclosure - Preliminary injunction

Where a Superior Court judge issued a preliminary injunction restricting a defendant from foreclosing on certain "subprime" loans, the judge committed no error and thus the order should be affirmed.

*Commonwealth v. Fremont Investment & Loan, et al.* (Lawyers Weekly No. 10-209-08) (26 pages) (Botsford, J.) Motion for preliminary injunction heard by Gants, J., in Superior Court. James R. Carroll, Peter Simshauser and Christian R. Jenner, all of Skadden, Arps, Slate,

## CONSTITUTIONAL

### Double jeopardy - Mistrial

Where a mistrial was declared following the dismissal of a juror in a drunk driving prosecution, double jeopardy principles bar the commonwealth from retrying the defendant.

*Commonwealth v. Nicoll* (Lawyers Weekly No. 10-218-08) (10 pages) (Cordy, J.) Case tried before Carey, J., in District Court. Judith Ellen Pietras for the commonwealth; Charles K. Stephenson and Barbara J. Sweeney for the defendant (Docket No. SJC-10133) (Dec. 23, 2008).

### Due process - 'SDP' adjudication

Where a defendant adjudicated to be a sexually dangerous person has appealed, we conclude that the appeal must fail because (1) the evidence was adequate to support the judge's finding that the defendant was a sexually dangerous person and (2) no due process violation occurred as the result of the judge keeping the matter under advisement for 13 months.

Having so decided, however, we go on to rule that in future, for jury-waived trials pursuant to G.L.c. 123A, §14, and in the absence of extraordinary circumstances, the judge must render a decision within 30 days of the end of trial.

*Commonwealth v. Blake* (Lawyers Weekly No. 10-124-09) (31 pages) (By the court) (Ireland, J., joined by Spina and Cowin, JJ., concurring) (Gants, J., joined by Cordy, J., concurring) (Marshall, C.J., joined by Botsford, J., concurring in part and dissenting in part) Case heard by McDonald, J., in the Superior Court. Colleen C. Currie for the defendant; Steven Greenbaum for the commonwealth; Eric Tennen submitted a brief for Committee for Public Counsel Services, amicus curiae (Docket No. SJC-10232) (July 16, 2009).

### Search and seizure - Sobriety checkpoint - Guideline

Where (1) a defendant was arrested by the police at a Bridgewater roadblock established as a sobriety checkpoint, (2) the roadblock was conducted pursuant to a guideline which allowed, but did not require, an officer who made the initial stop of a vehicle at a sobriety checkpoint to divert the vehicle to a secondary screening area for further inquiry when the officer had a reasonable suspicion, based on articulable facts, that the driver was operating under the influence of alcohol or drugs or had committed another violation of law and (3) the defendant moved to suppress evidence obtained as a result of his seizure at the roadblock, we hold that a judge erred in granting the suppression motion, as the neither the guideline in question, nor the roadblock, was unconstitutional.

*Commonwealth v. Swartz* (Lawyers Weekly No. 10-125-09) (10 pages) (Gants, J.) Pretrial suppression motion heard by Nagle, J.; application for leave to file interlocutory appeal allowed by Bostford, J., in the Supreme Judicial Court for the county of Suffolk. Robert C. Thompson for the commonwealth; David J. Nathanson, of Wood & Nathanson, for the defendant (Docket No. SJC-10426) (July 23, 2009).

### Search and seizure - Sobriety checkpoint - Guideline

Where (1) a defendant was arrested by the police at a Bridgewater roadblock established as a sobriety checkpoint, (2) the roadblock was conducted pursuant to a guideline which allowed, but did not require, an officer who made the initial stop of a vehicle at a sobriety checkpoint to divert the vehicle to a secondary screening area for further inquiry when the officer had a reasonable suspicion, based on ar-



ticulable facts, that the driver was operating under the influence of alcohol or drugs or had committed another violation of law and (3) the defendant moved to suppress evidence obtained as a result of his seizure at the roadblock, we hold that a judge erred in granting the suppression motion, as the guideline in question was constitutional.

*Commonwealth v. Murphy* (Lawyers Weekly No. 10-126-09) (18 pages) (Gants, J.) Pretrial suppression motion heard by McGovern, J.; application for leave to file interlocutory appeal allowed by Botsford, J., in the Supreme Judicial Court for the county of Suffolk and the appeal was reported by her to the Appeals Court; application for direct appellate review subsequently granted by the Supreme Judicial Court. Alexei Tymoczko and Carolyn L. Hely for the commonwealth; Lisa M. Kavanaugh for the defendant; John M. Milligan Jr. submitted a brief for Massachusetts Association of Criminal Defense Lawyers, amicus curiae (Docket No. SJC-10287) (July 23, 2009).

## CONSUMER PROTECTION

### Cigarettes

Where a lawsuit has been brought under G.L.c. 93A over claims on cigarette packages, the complaint is not exempt from the reach of G.L.c. 93A and thus an award of summary judgment for the plaintiffs must be affirmed.

*Aspinall, et al. v. Philip Morris, Inc., et al.* (Lawyers Weekly No. 10-044-09) (9 pages) (Ireland, J.) Case heard by Lauriat, J., on motions for summary judgment. Kenneth J. Parsigian and Michael K. Murray, both of Goodwin Procter, for the defendants; Todd S. Heyman and Thomas V. Urmy Jr., both of Shapiro Haber & Urmy, for the plaintiffs; the following submitted briefs for amici curiae: Michael S. Fried and Christian G. Vergonis, of the District of Columbia, and Garfield B. Simms, of Jones Day, for James C. Miller III and others; Allison M. Zieve, Brian Wolfman and Jennifer Soble, of the District of Columbia, and John Roddy for Public Citizen, Inc., and others; Robert A. Sherman, Donald R. Frederico and David G. Thomas, all of Greenberg Traurig, and Ellis V. Disch for Associated Industries of Massachusetts and another; Martha Coakley and Geoffrey G. Why for the commonwealth (Docket No. SJC-09981) (March 16, 2009).

### Class action - Arbitration

Where a provision in a consumer contract compelling individual arbitration stated that it foreclosed a statutory right to participate in class action lawsuits, we hold that the provision was not enforceable because it is contrary to the fundamental public policy of the commonwealth favoring consumer class actions under G.L.c. 93A.

Having said this, however, we go on to conclude that the plaintiffs failed to state a claim under G.L.c. 93A.

*Feeney, et al. v. Dell Inc., et al.* (Lawyers Weekly No. 10-118-09) (31 pages) (Marshall, C.J.) Motions to vacate arbitration award, to reconsider orders compelling arbitration and to confirm arbitration award and to dismiss with prejudice heard by Fremont-Smith, J., in the Superior Court. Edward D. Rapacki and Joseph M. Makalusky, both of Ellis &

Rapacki, for the plaintiffs; John A. Shope and Kirk G. Hanson, both of Foley Hoag, for the defendants; Dwight Golann, pro se, submitted an amicus curiae brief; Ben Robbins, Martin J. Newhouse and Jo Ann Shotwell submitted a brief for New England Legal Foundation, et al., amici curiae; Martha Coakley, Matthew H. Schrupf and Jennifer Grace Miller submitted a brief for the commonwealth, amicus curiae (Docket No. SJC-10259) (July 2, 2009).

### Ticket reseller - Standing

Where a plaintiff sued the defendant, a licensed ticket reseller, for offering to sell him Red Sox tickets at prices that allegedly were unlawful under G.L.c. 140, §185D, which imposes limitations on the prices ticket resellers may charge, a judgment for the defendant must be affirmed based on the plaintiff's lack of standing.

*Herman v. Admit One Ticket Agency LLC* (Lawyers Weekly No. 10-151-09) (17 pages) (Spina, J.) (Cowin, J., dissenting) Case heard by Coven, J., in District Court. Richard E. Quinby and Katherine C. Santos, both of Craig & Macauley, for the plaintiff; Joel G. Beckman and Michael G. Paris, both of Nystrom, Beckman & Paris, for the defendant; Daniel L. Goldberg, Charles L. Solomont, Brandon L. Bigelow and Samuel R. Rowley, all of Bingham McCutchen, for New England Patriots, L.P., and another, amici curiae, submitted a brief; Ben Robbins, Martin J. Newhouse and Jo Ann Shotwell Kaplan, for New England Legal Foundation and another, amici curiae, submitted a brief (Docket No. SJC-10326) (Aug. 27, 2009).

## CONTRACT

### Joint ventures - Dissolution

Where a plaintiff — acting pursuant to G.L.c. 108A, §31(1)(b), which allows a joint venturer in certain circumstances to dissolve unilaterally a joint venture without thereby causing a breach of the joint venture agreement — sent notices of dissolution purporting to dissolve three real estate joint ventures with the defendants, we conclude (1) that G.L.c. 108A, §31(1)(b) was inapplicable, as the joint ventures were not "at will," and (2) that a genuine issue exists regarding whether the joint ventures should be dissolved on equitable grounds under G.L.c. 108A, §32(1)(f).

*BPR Group Limited Partnership v. Bendetson, et al.* (Lawyers Weekly No. 10-085-09) (28 pages) (Spina, J.) (Gants, J., concurring in part) Motions for partial summary judgment heard by van Gestel, J., and case heard by him. Thomas N. O'Connor and David B. Mack, both of O'Connor, Carnathan and Mack, for the plaintiff; Albert P. Zabin, of Duane Morris, for the defendants (Docket No. SJC-10301) (May 21, 2009).

## CORPORATE

### Shareholder derivative action

Where a judge dismissed a shareholder derivative complaint, the dismissal order should be affirmed under applicable Delaware law.

*Johnston v. Box, et al.* (Lawyers Weekly No. 10-062-09) (21 pages) (Cordy, J.) Motion to dismiss heard by van Gestel, J., and

a motion to alter or amend the judgment also heard by him. Eric L. Zagar, Tara P. Kao and James H. Miller, all of Pennsylvania, for the plaintiff; Roger A. Lane and Courtney Worcester, both of Pepper Hamilton, and Matthew Martel for Special Litigation Committee of the Board of Directors of American Tower Corporation; Douglas S. Brooks, of LibbyHoopes, for Joseph L. Winn, was present but did not argue; Kurt Wm. Hemr, of Skadden, Arps, Slate, Meagher & Flom, for Arnold L. Chavkin, was present but did not argue; Meredith A. Wilson, of Rose, Chinitz & Rose, for Alan L. Box and others, was present but did not argue; Marbree D. Sullivan, of Mintz, Levin, Cohn, Ferris, Glosky & Popeo, for Steven B. Dodge, was present but did not argue (Docket No. SJC-10231) (April 13, 2009).

## CRIMINAL

### Armed assault - Consciousness of guilt - Duplicative instructions

Where a Superior Court jury convicted the defendant of armed assault with intent to murder, assault and battery by means of a dangerous weapon causing serious bodily injury, unlawful possession of a firearm and unlawful possession of ammunition, the convictions should be affirmed.

We so conclude because (1) it was proper for the judge to give an instruction on consciousness of guilt with respect to the defendant's statements to the police and his alleged flight, (2) there is no merit to the defendant's assertion that the jury should have been given the option of returning a verdict of armed assault with intent to kill, rather than armed assault with intent to murder, if they concluded that the commonwealth did not establish the absence of mitigation beyond a reasonable doubt and (3) the defendant's conviction of assault and battery by means of a dangerous weapon causing serious bodily injury was not duplicative of his conviction of armed assault with intent to murder.

*Commonwealth v. Vick* (Lawyers Weekly No. 10-131-09) (34 pages) (Spina, J.) (Botsford, J., with whom Cordy, J., joins, concurring in part and dissenting in part) Cases tried before Connors, J., in Superior Court. Peter M. Onek for the defendant; Denise J. Casper and Elizabeth Keeley for the commonwealth (Docket No. SJC-10385) (July 30, 2009).

### Armed assault with intent to murder

Where a Superior Court judge dismissed an indictment charging a defendant with armed assault with intent to murder, the judge erred, as the evidence put before the grand jury was sufficient to prosecute the defendant on that charge.

*Commonwealth v. Moran* (Lawyers Weekly No. 10-088-09) (10 pages) (Botsford, J.) Case reported by Cordy, J., sitting as single justice. Varsha Kukafka for the commonwealth; John D. Cheverie for the defendant (Docket No. SJC-10252) (May 22, 2009).

### Attempted subornation of perjury

Where a defendant was convicted of attempted subornation of perjury and making a false report to police officers, reversal is not warranted, as the indictment was sufficient and the evidence was enough to allow the jury to convict.

*Commonwealth v. Senior* (Lawyers Weekly No. 10-092-09) (9 pages) (Ireland, J.) Cases tried before Lu, J., in Superior Court. James L. Rogal, of Ablitt Law Offices, for the defendant; Ellyn H. Lazar-Moore for the commonwealth (Docket No. SJC-10289) (May 28, 2009).

## CRIMINAL

Continued from page 31

### Child rape – Cross-examination

Where a jury convicted a defendant of rape of a child and indecent assault and battery on a child under 14, the defendant's appeal must be rejected, as the trial judge did not improperly restrict defense counsel's cross-examinations of commonwealth witnesses.

*Commonwealth v. Avalos* (Lawyers Weekly No. 10-093-09) (14 pages) (Cordy, J.) Cases tried before Fahey, J., in Superior Court. Theodore F. Riordan and Deborah Bates Riordan, both of Bates & Riordan, for the defendant; Macy Lee and Leora Joseph for the commonwealth (Docket No. SJC-10254) (May 28, 2009).

### Child rape – First complaint – Priest-penitent privilege

Where a jury convicted a defendant of two counts of rape of a child, four counts of indecent assault and battery on a child under fourteen and one count each of assault and battery and threatening to commit a crime, the defendant's appeal of those convictions must be rejected, as there was no reversible error in the judge's evidentiary rulings.

*Commonwealth v. Kebreau* (Lawyers Weekly No. 10-123-09) (29 pages) (Cowan, J.) Motion to suppress evidence heard by Lowy, J., and cases tried before him. Iris Alkalay for the defendant; Catherine Langevin Semel for the commonwealth; Lydia Watts and Brenda R. Sharton, Jennifer M. Mendola and James M. Hlawek, all of Goodwin Procter, for Victim Rights Law Center & others, amici curiae, submitted a brief (Docket No. SJC-10317) (July 16, 2009).

### Delayed disclosure of exculpatory evidence

Where a defendant has challenged his conviction for negligent vehicular homicide, we hold that he must be granted a new trial because, although there was sufficient evidence introduced at his trial for a rational jury to have found beyond a reasonable doubt that he was guilty of the crime charged, he was unfairly prejudiced by the delayed disclosure of an accident reconstruction expert's material exculpatory opinion.

*Commonwealth v. Merry* (Lawyers Weekly No. 10-064-09) (22 pages) (Cowan, J.) Case reported by Cordy, J., sitting as single justice. Neil Rossman, of Rossman & Rossman, and Carlene A. Pennell for the defendant; Paul B. Linn and Nicholas J. Walsh for the commonwealth (Docket No. SJC-10250) (April 16, 2009).

### Detention – Unlicensed possession of firearm

Where the commonwealth moved pursuant to G.L.c. 276, §58A to detain two defendants charged with unlicensed possession of a firearm, an order denying the motion should be affirmed on the ground that unlicensed possession of a firearm does not qualify as a predicate offense pursuant to the statute.

*Commonwealth v. Young, et al.* (Lawyers Weekly No. 10-072-09) (19 pages) (Spina, J.) (Cowan, J., dissenting) Case reported by Spina, J., sitting as single justice. Rachel J. Eisenhaure and C. Samuel Sutter for the commonwealth; Willie J. Davis, of Davis, Robinson & White, for Thomas Young; Paul W. Patten for Jermaine Rodrigues; Murray A. Kohn submitted a brief for Committee for Public Counsel Services, amicus curiae (Docket No. SJC-10147) (May 4, 2009).

### Dismissal of indictment

Where certain circumstances exist, a Superior Court judge may dismiss a valid indictment, after accepting a guilty plea, by "continuing the case without a finding" and imposing conditions.

*Commonwealth v. Powell* (Lawyers Weekly No. 10-034-09) (14 pages) (Cordy, J.) Motion to compel dismissal of indictment heard by Dortch-Okara, J., in the Superior Court. Pamela Alford and Brian A. Wilson for the commonwealth; Carlo A. Obligato for the defendant (Docket No. SJC-10211) (March 3, 2009).

### Double jeopardy – Motion to suppress

Where (1) a District Court judge heard evidence simultaneously for purposes of a suppression hearing and a trial on a controlled substance charge, (2) before the District Court proceedings were completed, the defendant was indicted in Superior Court and (3) the Superior Court judge dismissed the indictment, we conclude that the dismissal of the in-

(2) the trial judge acted permissibly by failing to give a missing witness instruction and (3) there was nothing improper about the prosecutor's closing argument.

*Commonwealth v. Morales* (Lawyers Weekly No. 10-007-09) (19 pages) (Spina, J.) Cases tried before Ford, J., in Superior Court. Stephen Neyman on appeal for the defendant; Jane Davidson Montori for the commonwealth (Docket No. SJC-09809) (Jan. 9, 2009).

### First-degree murder

Where a defendant has appealed his conviction for first-degree murder, his appeal must fail, as (1) the prosecutor did not impermissibly vouch for the credibility of two witnesses and (2) no merit exists to the defendant's claim that he was denied a fair trial due to a late disclosure by the commonwealth of blood splatter diagrams.

*Commonwealth v. Almeida* (Lawyers Weekly No. 10-196-08) (22 pages) (Cowan, J.) Case tried before Gary A. Nickerson, J.; motion for a new trial heard by him. Greg T. Schubert for the defendant; Shoshana E. Stern for the commonwealth (Docket No. SJC-08965) (Nov. 21, 2008).

## Justice Roderick L. Ireland



Appointed to SJC: 1997

Will reach retirement age: 2014

Majority opinions written this year: 17

Concurring opinions written this year: 1

Dissenting opinions written this year: 5

Concurrences joined in: 1

**Notable decision:** *Aspinall, et al. v. Philip Morris, et al.* (Lawyers Weekly No. 10-044-09), which determined that a lawsuit could be brought under G.L.c. 93A over claims on cigarette packages

dictment was proper according to double jeopardy principles and that the trial should be completed in District Court.

*Commonwealth v. Love* (Lawyers Weekly No. 10-181-08) (16 pages) (Cowan, J.) Case reported by Spina, J., sitting as single justice. Jane Davidson Montori for the commonwealth; Joseph D. Bernard for the defendant (Docket No. SJC-09952) (Nov. 4, 2008).

### Felony murder

Where a defendant has appealed his conviction for murder in the first degree based on a theory of felony murder, we hold that the appeal must fail because the judge did not commit reversible error (1) in admitting testimony that, a few days before the murder in this case, an individual named Richard Molina solicited another person, Miguel Valentin, to commit a murder, with the details of the solicitation at least somewhat similar to the events that took place subsequently with the defendant present, or (2) by permitting testimony regarding Valentin's testimony at an earlier trial of Molina.

*Commonwealth v. Rodriguez* (Lawyers Weekly No. 10-116-09) (11 pages) (Cowan, J.) Case tried before Whitehead, J., in the Superior Court. David M. Skeels for the defendant; Kenneth E. Steinfield for the commonwealth (Docket No. SJC-09284) (July 2, 2009).

### First-degree murder

Where a jury has convicted a defendant of first-degree murder, his appeal from that conviction cannot succeed, as (1) his trial counsel was not ineffective,

defense and (4) the defendant's motion for a new trial was correctly denied.

*Commonwealth v. Sharpe* (Lawyers Weekly No. 10-112-09) (17 pages) (Spina, J.) (Appeals Court) Case tried before Connolly, J., and motion for a new trial heard by him. Richard J. Shea for the defendant on appeal; Laurie S. Yeshulas for the commonwealth (Docket No. SJC-08986) (June 22, 2009).

### First-degree murder – Deliberate premeditation

Where a defendant has appealed his convictions for murder in the first degree by reason of deliberate premeditation, armed assault with intent to murder and assault and battery by means of a dangerous weapon, we conclude that the appeal must be rejected because the defendant has not demonstrated that reversible error occurred in the exclusion of certain evidence, in the prosecutor's closing argument or in the judge's jury instructions.

*Commonwealth v. Whitman* (Lawyers Weekly No. 10-035-09) (28 pages) (Cordy, J.) Cases tried before Welch, J., in the Superior Court. Stephen B. Hrones and Michael Tumposky, both of Hrones, Garity & Hedges, for the defendant; Kenneth E. Steinfield for the commonwealth (Docket No. SJC-10131) (March 6, 2009).

### First-degree murder – 'Ineffective assistance' claim

Where a defendant, who was convicted of first-degree murder for killing his wife, has appealed, we hold that the appeal must fail, as the defendant has not demonstrated (1) that he received ineffective assistance from trial counsel, (2) that the trial judge framed an erroneous instruction regarding provocation and (3) that the trial judge abused her discretion in denying the defendant's new trial motion without holding an evidentiary hearing.

*Commonwealth v. Mercado* (Lawyers Weekly No. 10-202-08) (17 pages) (Cowan, J.) Case tried before Kern, J., in the Superior Court, and motions for a new trial and to reduce the verdict also considered by her. Leslie W. O'Brien for the defendant; Catherine Langevin Semel for the commonwealth (Docket No. SJC-09862) (Nov. 26, 2008).

### First-degree murder – 'Ineffective assistance' claim

Where a defendant has challenged his first-degree murder conviction, we conclude that his challenge must be rejected because he has not demonstrated (1) that he received ineffective assistance of counsel at trial or (2) that the judge erred in denying the defendant's motions for postconviction discovery and a new trial.

*Commonwealth v. Morgan* (Lawyers Weekly No. 10-010-09) (16 pages) (Cordy, J.) Cases tried before Gershengorn, J., and a motion for a new trial and motions for postconviction discovery were heard by her. Michael D. Cutler for the defendant; Kevin J. Curtin for the commonwealth (Docket No. SJC-09618) (Jan. 13, 2009).

### First-degree murder – Intercepted telephone statements

Where a defendant has appealed his conviction for first-degree murder on theories of extreme atrocity or cruelty, premeditation and felony murder, we conclude that he appeal must be denied.

We do so because we reject the defendants' arguments that " (1) evidence of electronically intercepted statements he made in the course of telephone calls he placed from the Worcester County jail should have been suppressed on both statutory and constitutional grounds; (2) evidence of the defendant's statement regarding possible sentences should have

### First-degree murder

Where two defendants have been convicted of first-degree murder, their appeal must fail, as (1) the judge below did not err in denying a motion to suppress physical evidenced and a witness's identification of one of the defendants, (2) the prosecutor's closing argument did not improperly attempt to inflame the jury's emotions and (3) the jury instructions were not erroneous.

*Commonwealth v. Phillips* (and five companion cases) (Lawyers Weekly No. 10-197-08) (29 pages) (Greaney, J.) Motions to suppress evidence heard by Lauriat, J.; cases tried before him; and motion for a new trial and motion for leave to adopt new trial motion also heard by him. Richard J. Shea for Parrish Phillips; R. Bradford Bailey and Charles Dolan, both of Denner Pellegrino, for Phillip Rise; Kristin Lombard O'Donnell for the commonwealth (Docket No. SJC-09231) (Nov. 24, 2008).

### First-degree murder

Where a defendant has been convicted of first-degree murder, the conviction should be affirmed because (1) the trial judge committed no reversible error in admitting into evidence hearsay statements of the victim (the defendant's girlfriend) to show her state of mind, (2) the defendant was not prejudiced by the erroneous admission of testimony that the defendant's former wife obtained a G.L.c. 209A abuse prevention order against him in 1993, (3) the judge's decision to exclude the victim's affidavits in support of her applications for G.L.c. 209A orders did no harm to the defendant's "provocation"

been excluded as an offer to plead; (3) the trial judge erred in his evidentiary rulings and in his instructions to the jury concerning the failure of the State police to record their interrogations of the defendant; (4) evidence of the defendant's admissions to the police during their second interrogation of him should have been suppressed, because the defendant was experiencing a panic attack during the interview, and as a result, his waiver of Miranda rights was invalid and his confession was involuntary; and (5) expert testimony should not have been admitted on the issue of shoe print identification.

*Commonwealth v. Boyarsky* (Lawyers Weekly No. 10-208-08) (23 pages) (Botsford, J.) Pretrial suppression motion heard by Hillman, J., and the cases were tried before him. Randolph Gioia and Elizabeth Billowitz for the defendant; Ellyn H. Lazar-Moore for the commonwealth (Docket No. SJC-09996) (Dec. 9, 2008).

## First-degree murder - Out-of-state statements - Autopsy photograph

Where a defendant has appealed his first-degree murder conviction, we conclude that the appeal must fail because (1) a judge acted permissibly in allowing into evidence a statement the defendant made to Massachusetts state troopers in North Carolina, as the evidence did not show that the troopers intentionally withheld the defendant's right to use a telephone in order to coerce him or gain an advantage in their investigation, (2) an autopsy photo of a screwdriver protruding from a wound in the victim's skull was properly admitted to show that the relevant killing was committed with deliberate premeditation or with extreme atrocity or cruelty and (3) the judge committed no error in refusing to give a jury instruction on the law of imperfect defense of another where no view of the evidence warranted such an instruction.

*Commonwealth v. Haith* (Lawyers Weekly No. 10-172-08) (11 pages) (Greaney, J.) Pretrial suppression motion heard by Gershengorn, J.; case tried before Dortch-Okara, J., in the Superior Court. Janet H. Pumphrey for the defendant; Pamela Alford for the commonwealth (Docket No. SJC-09880) (Oct. 16, 2008).

## First-degree murder - Right to confrontation

Where a defendant has appealed his first-degree murder conviction, we hold that the appeal must fail because: (1) the defendant's right to confrontation was not violated when a pathologist, called by the commonwealth, was permitted to give his expert opinion regarding the cause of the victim's death, expert opinion which was based, in large part, on findings made during the course of an autopsy which that pathologist did not himself perform or attend; (2) no substantial likelihood of a miscarriage of justice occurred as a result of the admission of the pathologist's direct testimony about the foundation of his opinion; (3) the trial judge acted permissibly in admitting a photocopy of an allegedly forged check; and (4) no substantial likelihood of a miscarriage of justice occurred because of the judge's jury instruction on deliberate premeditation.

*Commonwealth v. Nardi* (Lawyers Weekly No. 10-170-08) (28 pages) (Cordy, J.) Case tried before Giles, J., in the Superior Court. Stewart T. Graham Jr. for the defendant; Robert C. Thompson for the commonwealth (Docket No. SJC-09963) (Sept. 25, 2008).

## First-degree murder - Stabbing

Where a defendant, who stabbed his estranged wife, has appealed his first-degree murder conviction, we hold that the

appeal must be rejected because no reversible error occurred in a denial of the defendant's suppression motion, in a denial of his motion for required findings of not guilty or in the judge's jury instructions.

*Commonwealth v. Townsend* (Lawyers Weekly No. 10-045-09) (25 pages) (Ireland, J.) Pretrial suppression motion heard by Ford, J.; case tried before Carhart, J., in the Superior Court. Stewart T. Graham Jr. for the defendant; David F. Capeless for the commonwealth (Docket No. SJC-10035) (March 16, 2009).

## First-degree murder - Statements to police

Where a defendant has appealed her first-degree murder conviction, we hold that the appeal must be rejected, as (1) the motion judge acted permissibly in admitting statements the defendant made to the police during a lengthy interrogation, (2) defense counsel has not been demonstrated to have provided ineffective assistance, (3) the trial judge did not err in issuing a ruling limiting the proposed testimony of a defense expert regarding the voluntariness of statements made during the defendant's interrogation, (4) the evidence did not warrant a jury instruction on involuntary manslaughter as an alternative to murder and (5) the judge's jury instructions did not contain errors requiring reversal.

*Commonwealth v. Tolan* (Lawyers Weekly No. 10-063-09) (26 pages) (Cordy, J.) Pretrial suppression motion considered by Kane, J.; case tried before Chin, J., and a new trial motion was heard by him. Peter M. Onok for the defendant; Shoshana E. Stern and Rachel J. Eisenhaure for the commonwealth (Docket No. SJC-09748) (April 14, 2009).

## Homicide - Degree of guilt

Where a defendant, who killed her daughter, has appealed her first-degree murder conviction and a denial of her new trial motion, we conclude that the conviction and motion denial should be affirmed but that the degree of guilt should be reduced to murder in the second degree.

*Commonwealth v. Colleran* (Lawyers Weekly No. 10-174-08) (23 pages) (Spina, J.) Case tried before Quinlan, J., and a new trial motion was heard by her. Janet H. Pumphrey for the defendant; Julia K. Holler for the commonwealth (Docket No. SJC-09107) (Oct. 23, 2008).

## Inducement - Identity

Where a Superior Court judge, in response to a discovery motion filed by a criminal defendant, entered an order requiring the commonwealth to reveal whether a person was acting as an agent or at the direction of the commonwealth and whether she was provided with any consideration in exchange for her alleged assistance, the order must be vacated because it was not supported by sufficient evidence that the defendant was induced to commit a crime.

*Commonwealth v. Mello* (Lawyers Weekly No. 10-079-09) (8 pages) (Botsford, J.) Case heard by Cordy, J., sitting as single justice. Timothy A. Shyne for the commonwealth; Stephen B. Hrones, of Hrones, Garrity, Hedges, for the defendant (Docket No. SJC-10148) (May 11, 2009).

## Ineffective assistance - Telephone records

Where a jury convicted a defendant of indecent assault and battery on a person over the age of 14, a new trial must be ordered because the defendant's trial counsel was ineffective.

*Commonwealth v. Ly* (Lawyers Weekly No. 10-119-09) (12 pages) (Cordy, J.) Case heard by Garth, J., and a motion for a new trial considered by him. Jennifer M. Petersen, of Petersen & Suchecki, on appeal for the defendant; Rachel J. Eisenhaure for the commonwealth (Docket No. SJC-10241) (July 10, 2009).

## Joint venture - Murder

Where a jury convicted a defendant of first-degree murder on a joint venture theory, his motion for a required finding of not guilty should have been granted because there was insufficient evidence that he deliberately premeditated the murder as part of a joint venture.

The case will be remand for a new trial, however, because we conclude that the commonwealth presented sufficient evidence to support the defendant's conviction based on principal liability and is not precluded from retrying the defendant solely as a principal.

*Commonwealth v. Zanetti* (Lawyers Weekly No. 10-135-09) (40 pages) (Gants, J.) (Cowan, J., dissenting) Case tried before Hillman, J., in Superior Court. Stephen Paul Maidman for the defendant; Michelle R. King for the commonwealth (Docket No. SJC-09995) (Aug. 3, 2009).

## Jury instructions - 'Honest but mistaken' identification

Where a defendant, having been convicted of possession of a firearm without a license, challenges the validity of the trial judge's instruction to the jury on the issue of his identification by various witnesses, we find no error and accordingly affirm the conviction.

*Commonwealth v. Pires* (Lawyers Weekly No. 10-009-09) (12 pages) (Ireland, J.) Case tried before Donovan, J., in Superior Court. Nona E. Walker for the defendant; David D. McGowan for the commonwealth (Docket No. SJC-10312) (Jan. 13, 2009).

## Lost or destroyed evidence

Where a single justice vacated a judge's order awarding relief based on lost or destroyed evidence, the single justice did not abuse his discretion.

*Commonwealth v. Narea* (Lawyers Weekly No. 10-101-09) (2 pages) (Rescript) Appealed from a judgment entered by Spina, J., sitting as single justice. Alexandria B. Lynn and Veronica J. White, both of White and Associates, for the defendant; Helle Sachse for the commonwealth (Docket No. SJC-190325) (June 11, 2009).

## Motion to withdraw guilty plea

Where a judge denied a defendant's motion to withdraw his plea of guilty to charges arising out of a robbery in which he participated in 1997, the order denying the motion should be overturned, as the plea was made intelligently and voluntarily.

*Commonwealth v. Furr* (Lawyers Weekly No. 10-103-09) (17 pages) (Cowan, J.) Motion to withdraw pleas of guilty con-

sidered by Lewis, J., in Superior Court. Dennis Shedd on appeal for the defendant; Helle Sachse for the commonwealth (Docket No. SJC-10281) (June 12, 2009).

## Murder - Armed robbery

Where a defendant has appealed his convictions for first-degree murder and armed robbery, we hold that the appeals must be rejected because (1) the trial judge acted permissibly in not allowing the defendant to introduce evidence of a prior event in which the defendant had allegedly prevented the crime victim from attacking another person, (2) the judge committed no error in admitting unrecorded statements the defendant made to the police, where the judge gave an appropriate instruction regarding unrecorded statements, (3) the evidence presented by the commonwealth was sufficient to support both of the defendant's convictions, (4) the judge did not err in not instructing the jury on assault and battery by means of a dangerous weapon as a lesser included offense of murder, (5) the prosecutor made no inappropriate remarks during closing which created a substantial likelihood of a miscarriage of justice and (6) the judge acted properly in instructing the jury that it had an obligation to return a verdict of the highest degree of murder proved beyond a reasonable doubt.

*Commonwealth v. Pimental* (Lawyers Weekly No. 10-136-09) (17 pages) (Botsford, J.) Cases tried before Giles, J., in the Superior Court. Stephen Paul Maidman for the defendant; Mary E. Lee for the commonwealth (Docket No. SJC-10077) (Aug. 3, 2009).

## Murder - Audiotaped interview

Where a defendant has been convicted of murder, that conviction must be affirmed, as (1) the trial judge's erroneous admission of statements of denial in an audiotaped interview was harmless given the overwhelming evidence of guilt, (2) the judge's admission of hearsay references by the police during that interview did not result in a miscarriage of justice and (3) the judge did not err in declining to instruct the jury on excessive force in self-defense.

*Commonwealth v. Diaz* (Lawyers Weekly No. 10-031-09) (27 pages) (Cowan, J.) Case tried before Agnes, J., and a motion for a new trial considered by him. Kathleen M. McCarthy for the defendant; Jessica Langsam for the commonwealth (Docket No. SJC-09559) (Feb. 24, 2009).

## Murder - Closing argument - DNA

Where a defendant has appealed his conviction for first-degree murder, the appeal must fail, as (1) the trial judge did not err by admitting evidence that the defendant often discussed and read about serial killers, (2) the defendant was not unfairly prejudiced by the prosecutor's closing argument which brought the feelings of the victim's husband and other members of the community to the jury's attention and (3) the defendant failed to substantiate alleged deficiencies in the Massachusetts State police crime laboratory that would have cast considerable doubt on the persuasive nature of the DNA evidence adduced against him at trial.

*Commonwealth v. Guy* (Lawyers Weekly No. 10-132-09) (12 pages) (Spina, J.) Case tried before Fabricant, J., and a motion for a new trial considered by her. Richard J. Fallon for the defendant on appeal; Pamela Alford for the commonwealth (Docket No. SJC-09967) (July 31, 2009).

## Murder - Domestic violence - Unrecorded statement

Where a defendant has been convicted of murdering his former wife, the conviction must be affirmed, as the trial judge

## CRIMINAL

Continued from page 33

did not err in (1) asking prospective jurors a question concerning domestic violence, (2) admitting into evidence the defendant's unrecorded statement to police and (3) denying his motion for a required finding of not guilty.

*Commonwealth v. Garuti* (Lawyers Weekly No. 10-097-09) (20 pages) (Ireland, J.) Case tried before Giles, J., and motion for a new trial considered by her. Stephen Paul Maidman for the defendant; Michael H. O'Connell for the commonwealth (Docket No. SJC-09897) (June 10, 2009).

### Murder - 'Ineffective assistance' claim

Where a defendant has appealed her convictions for first-degree murder and armed robbery, we conclude that her appeal must be rejected because her counsel did not provide ineffective assistance (1) in failing to argue that the defendant's mother lacked authority to consent to a search of the defendant's personal papers which were located in the mother's basement and (2) in not introducing certain evidence to corroborate the defendant's claim that she was suffering from battered woman's syndrome at the time of her flight from the murder scene.

*Commonwealth v. Williams* (Lawyers Weekly No. 10-025-09) (15 pages) (Cowan, J.) Pretrial suppression motion heard by Borenstein, J.; case tried before Fabricant, J., and a new trial motion heard by her. Leslie W. O'Brien for the defendant; Pamela Alford for the commonwealth (Docket No. SJC-09737) (Feb. 12, 2009).

### Murder - Motions to dismiss and to suppress - Motions for mistrial and for new trial

Where a defendant has been convicted of first-degree murder, his conviction should be affirmed, as the lower court committed no reversible error in denying the defendant's motions to dismiss, to suppress statements, for a mistrial, for a new trial and for reconsideration of the denial of his new trial motion.

*Commonwealth v. Druce* (Lawyers Weekly No. 10-067-09) (29 pages) (Ireland, J.) Motion to dismiss and to suppress heard by Hillman, J.; case tried before Fecteau, J., and motion for a new trial and motion to reconsider considered by him. Greg T. Schubert for the defendant on appeal; Donna-Marie Haran for the commonwealth (Docket No. SJC-10045) (April 27, 2009).

### Murder - Newly discovered ballistics evidence

Where two defendants have challenged their first-degree murder convictions, their appeal must fail, as they have pointed out no reversible errors.

In affirming the convictions, we find that the commonwealth's failure to disclose during trial that the murder weapons were in state custody was not a violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

*Commonwealth v. Caillot* (and a companion case) (Lawyers Weekly No. 10-121-09) (30 pages) (Gants, J.) Cases tried before Sikora, J., and motions for postconviction relief heard by him. Donald A. Harwood for Manuel E. Santos; John J. Barter for Herby Caillot; Gail M. McKenna for the commonwealth; Michael R. Schneider, of Salsberg & Schneider, and John M. Thompson, of Thompson & Thompson, for Committee for Public Counsel Services and another, amici curiae, submitted a brief (Docket No. SJC-08383a) (July 10, 2009).

### Murder - Prosecution witness

Where a defendant was convicted of murder in the first degree by reason of extreme

atrocious or cruelty, the conviction should be affirmed, as the defendant was not unfairly prejudiced by any delay in his counsel being informed that a prosecution witness was a confidential police informant.

*Commonwealth v. Molina* (Lawyers Weekly No. 10-120-09) (18 pages) (Ireland, J.) Case tried before Whitehead, J., in Superior Court. Janet H. Pumphrey for the defendant on appeal; Kenneth E. Steinfield for the commonwealth (Docket No. SJC-09060) (July 10, 2009).

### Murder - Prosecutor's mischaracterization of evidence

Where a jury convicted a defendant of first-degree murder, a new trial must be ordered because of misstatements of the evidence made by the prosecutor during his closing argument (to which the defendant's trial counsel objected) that were not harmless in the circumstances of this case.

*Commonwealth v. Silva-Santiago* (Lawyers Weekly No. 10-081-09) (38 pages) (Gants, J.) Motion to suppress heard by DeVecchio, J., and case tried before Giles, J., in Superior Court. Jeffrey L. Baler on appeal for the defendant; John E. Bradley for the commonwealth (Docket No. SJC-10154) (May 15, 2009).

## Justice Judith A. Cowin



Appointed to SJC: 1999

Will reach retirement age: 2012

Majority opinions written this year: 23

Concurring opinions written this year: 1

Concurring in the judgment opinions written this year: 1

Dissenting opinions written this year: 4

Concurrences joined in: 1

Dissents joined in: 4

**Notable decision:** *Kenniston, et al. v. Department of Youth Services, et al.* (Lawyers Weekly No. 10-021-09), which declared unconstitutional a statute under which three juveniles who had been committed to the care of the Department of Youth Services were subjected to three-year commitment extensions beyond their 18th birthdays

### Murder - Provocation

Where a defendant convicted of first-degree murder claims that he was entitled to an instruction on voluntary manslaughter based on reasonable provocation induced by the victim's stalking him, that argument must be rejected because neither the evidence presented at trial nor that submitted in support of the new trial motion supported a manslaughter instruction in this case.

*Commonwealth v. Benson* (Lawyers Weekly No. 10-013-09) (16 pages) (Botsford, J.) Case tried before Giles, J., and motion for new trial considered by her. Myles D. Jacobson, of Jacobson & Fellows, for the defendant; Robert C. Thompson for the commonwealth (Docket No. SJC-09636) (Jan. 16, 2009).

### Murder - Unavailable witness - Grand jury testimony

Where a father and son were convicted of first-degree murder, the trial judge did not err in excluding grand jury testimony by a witness who refused to testify at trial.

*Commonwealth v. Clemente* (and 14 companion cases) (Lawyers Weekly No. 10-165-08) (54 pages) (Cowan, J.) Cases tried before McDaniel, J., and motions for a new trial heard by Spurlock, J., in Superior Court. Robert L. Sheketoff for Damian A. Clemente; Rosemary Curran Scapicchio and Adam Foss for Anthony P. Clemente. David D. McGowan for the commonwealth (Docket No. SJC-07824) (Sept. 5, 2008).

### Murder - Videotapes

Where a defendant has appealed his murder conviction, the appeal must fail, as the lower court did not err in denying the defendant's motion for required findings of not guilty.

*Commonwealth v. Huynh* (Lawyers Weekly No. 10-177-08) (12 pages) (Spina, J.) Cases tried before Velis, J., and motion for new trial considered by him. Stephen Paul Maidman for the defendant on appeal; Bethany C. Lynch for the commonwealth (Docket No. SJC-09557) (Oct. 28, 2008).

### Negligent operation of motor vehicle

Where (1) a defendant filed a pretrial motion to suppress the results of a field sobriety test, (2) a judge held a hearing on the motion in the same proceeding as the defendant's jury-waived trial, (3) evidence was introduced at the combined proceeding that the defendant had initially refused to perform a field sobriety test, (4) the judge ultimately found the defendant guilty of negligent operation of a motor vehicle and (5) the defendant now claims that the conviction should be reversed because the refusal evidence was wrongfully admitted at trial, we find that no reversible error oc-

and federal rights not to be deprived of liberty without due process, we hold that the dismissal was unwarranted for such non-prejudicial police misconduct where lesser sanctions were available.

*Commonwealth v. Mason* (Lawyers Weekly No. 10-086-09) (10 pages) (Ireland, J.) Complaint ordered dismissed by Contant, J., in the District Court. Michele A. Rooke, of Doherty, Wallace, Pillsbury & Murphy, for the defendant; Thomas H. Townsend for the commonwealth (Docket No. SJC-10282) (May 21, 2009).

### Possession of child pornography

Where a defendant, who has been convicted of possession of child pornography, asserts that a judge erred in denying his motion to suppress child pornography found on his computer, we conclude that the defendant's claim has merit, as the search warrant authorizing a search of the defendant's private files was not supported by probable cause that they contained child pornography.

*Commonwealth v. Kaupp* (Lawyers Weekly No. 10-014-09) (18 pages) (Spina, J.) Pretrial suppression motion heard by Quinlan, J.; cases heard by Zobel, J., in the Superior Court. Peter M. Onek for the defendant; Casey E. Silvia for the commonwealth; Dena T. Sacco submitted a brief for National Center for Missing and Exploited Children, amicus curiae (Docket No. SJC-10177) (Jan. 16, 2009).

### Pretrial detention - Unlawful possession of firearm, subsequent offense

Where a defendant moved for relief from an order of pretrial detention based on an indictment charging him with unlawful possession of a firearm, subsequent offense, G.L.c. 269, §10(d), a single justice should have granted the request for relief, as the charged offense does not qualify as a predicate offense justifying detention.

*Alabi v. Commonwealth* (Lawyers Weekly No. 10-073-09) (2 pages) (Rescript) Elizabeth Doherty and Rene G. Brown for the defendant; C. Samuel Sutter and Rachel J. Eisenhaure for the commonwealth (Docket No. SJC-10024) (May 4, 2009).

### Privilege - Hearing transcript

Where (1) after holding an in camera hearing pursuant to *Commonwealth v. Martin*, 423 Mass. 496 (1996), a judge found that a witness at a narcotics trial had a valid Fifth Amendment privilege against compulsory self-incrimination, (2) the witness thereupon refused to testify on the defendant's behalf and (3) having been convicted of the charges against him, the defendant filed an appeal and petitioned for access to the hearing transcript, which was impounded, the petition was correctly denied on the ground that the witness's testimony at the hearing cannot constitutionally be disclosed to the defendant or his counsel.

*Pixley v. Commonwealth* (Lawyers Weekly No. 10-084-09) (15 pages) (Gants, J.) Case heard by Cordy, J., sitting as single justice. Jane E. Ross for the plaintiff; Joseph M. Ditkoff and Mark D. Zanini for the commonwealth; David M. Skeels, for Committee for Public Services, amicus curiae, submitted a brief (Docket No. SJC-10243) (May 19, 2009).

### Probation - GPS

Where a judge in the District Court has reported several questions concerning the constitutionality of G.L.c. 265, §47, a statute that requires a person who is "placed on probation" for certain sex offenses to wear a global positioning system (GPS) device as "a requirement of any term of probation," we decline to answer the questions because the defendant in this case has been placed on pretrial probation without a guilty plea or ad-

curred here and that the defendant's conviction may be affirmed.

*Commonwealth v. Healy* (Lawyers Weekly No. 10-182-08) (10 pages) (Cowan, J.) Pretrial suppression motion heard by Barrett, J., and the case was also heard by him. Mary E. Lee for the commonwealth; Karen W. Salon for the defendant (Docket No. SJC-10184) (Nov. 4, 2008).

### Operating under the influence - Breath analysis evidence

Where a defendant has been convicted of operating a motor vehicle under the influence of intoxicating liquor, second offense, we conclude that the conviction must be reversed and the case remanded for a new trial in light of the wrongful admission of certain breath analysis evidence.

*Commonwealth v. Hubert* (Lawyers Weekly No. 10-039-09) (2 pages) (Rescript) Case tried before Spurlock, J., in the Superior Court. Carina R. Canaan for the commonwealth; Thomas C. Foley for the defendant (Docket No. SJC-10234) (March 12, 2009).

### Police misconduct - Dismissal of complaint

Where a District Court judge dismissed a criminal complaint against a defendant because the police (1) prevented him from being released when his girlfriend sought to post his bail and thus (2) violated his state

mission to sufficient facts, and thus the statute has no application to him.

*Commonwealth v. Raposo* (Lawyers Weekly No. 10-075-09) (13 pages) (Botsford, J.) Questions of law reported to by Sabra, J., in District Court. Beth L. Eisenberg and Colleen A. Tynan for the defendant; Rachel J. Eisenhaure for the commonwealth (Docket No. SJC-10196) (May 7, 2009).

## Probation - GPS

Where a juvenile, who has been charged with certain sex offenses by complaint in the Juvenile Court, filed a petition in the county court pursuant to G.L.c. 211, §3, seeking relief from an order of a Juvenile Court judge imposing, pursuant to G.L.c. 265, §47, a requirement that he wear a global positioning system (GPS) device as a mandatory condition of his release on probation pending trial, he should be granted relief based on our conclusion that §47 does not apply to the juvenile while he is on probation pending trial.

*Emilio E., a juvenile v. Commonwealth* (Lawyers Weekly No. 10-078-09) (3 pages) (Rescript) Petition heard by Ireland, J., sitting as single justice. Sharon N. Chaitin-Pollak and Beth L. Eisenberg for the juvenile; Rachel J. Eisenhaure for the commonwealth (Docket No. SJC-10251) (May 7, 2009).

## Probation - Revocation

Where a criminal defendant's probation was revoked based on conduct he committed (contact with the victim) while still incarcerated, the revocation order must be reversed on the ground that the defendant did not receive adequate notice that the condition of probation prohibiting contact with the victim was in effect during the period of his incarceration.

*Commonwealth v. Ruiz* (Lawyers Weekly No. 10-054-09) (14 pages) (Marshall, C.J.) Probation revocation hearing held before Fishman, J., in Superior Court. John J. Barter for the defendant; Patricia Flannery for the commonwealth; Sharon N. Chaitin-Pollak, for Committee for Public Counsel Services, amicus curiae, submitted a brief (Docket No. SJC-10272) (March 31, 2009).

## Rape - Indecent assault and battery

Where a defendant has appealed his convictions for rape of a child with force, assault with attempt to commit rape, indecent assault and battery of a person who has attained the age of 14 and delivering liquor to a person under 21 years of age, we conclude (1) that errors were made throughout the trial that could have influenced the jury's verdicts on the charges of rape, assault with intent to rape and indecent assault and battery, requiring that those convictions be reversed, but (2) that no basis exists for reversing the defendant's conviction on the charge of delivering liquor to a person under 21 years of age.

Remand ordered.  
*Commonwealth v. Arana* (Lawyers Weekly No. 10-027-09) (25 pages) (Botsford, J.) Cases tried before Grabau, J., in the Superior Court. Robert F. Shaw Jr. for the defendant; Mary E. Lee for the commonwealth; Anthony D. Mirenda, Ara B. Gershengorn and Jennifer A. Cardello, all of Foley Hoag, and Lydia Watts for The Victim Rights Law Center, et al., amici curiae, submitted a brief; Julieann Hernon for Committee for Public Counsel Services, amicus curiae, submitted a brief (Docket No. SJC-10219) (Feb. 13, 2009).

## Revocation of pretrial release - Mootness

Where (1) a single justice denied a petitioner's request for review of a Superior Court order revoking the petitioner's pretrial release on personal recognizance and setting bail and (2) the petitioner has appealed, we find that the petitioner has now

been convicted of three offenses in the underlying criminal case and sentenced to terms in prison, making his request to be released on personal recognizance moot.

Appeal dismissed.  
*Abernathy v. Commonwealth* (Lawyers Weekly No. 10-018-09) (1 page) (Rescript) Appealed from a decision issued by Spina, J., sitting as single justice. Franklin B. Abernathy, pro se (Docket No. SJC-10327) (Jan. 29, 2009).

## Right to counsel - Forfeiture

Where a trial judge found that a criminal defendant forfeited his right to counsel at trial by reason of his wrongful behavior (threatening serious harm to his court-appointed counsel), a remand must be ordered so that the judge can consider evidence that may bear on the question of whether the sanction of forfeiture is both warranted and appropriate.

*Commonwealth v. Means* (Lawyers Weekly No. 10-104-09) (26 pages) (Marshall, C.J.) Motion to dismiss counsel heard by Linda E. Giles, J., and cases tried before her. Deborah Bates Riordan and Theodore F. Riordan, both of Bates & Riordan, for the defendant on appeal; Audrey Anderson Kachour for the commonwealth; Beth L. Eisenberg, Kristen J. Graves, Robert D. Fleischner and Susan F. Stefan, for Committee for Public Counsel Services and another, amici curiae, submitted a brief (Docket No. SJC-10262) (June 12, 2009).

## Sex offender - GPS

Where a judge ordered a defendant, who pled guilty to sex crimes in 1997, to wear a global positioning system tracking device as a condition of probation, that order must be vacated on the ground that the defendant's guilty plea predated the effective date of the statute authorizing the GPS device.

*Commonwealth v. Cory* (Lawyers Weekly No. 10-144-09) (36 pages) (Botsford, J.) (Ireland, J., with whom Spina and Cowin, JJ., join, dissenting) Proceeding for revocation of probation heard by Kane, J., in Superior Court. Theodore F. Riordan and Deborah Bates Riordan, both of Bates & Riordan, for the defendant; M. Catherine Huddleson for the commonwealth (Docket No. SJC-10314) (Aug. 18, 2009).

## Sex offenders - GPS

Where plaintiffs, who were ordered to wear a global positioning system device for the duration of their parole, sought declaratory and injunctive relief, that request should have been granted on the ground that the plaintiffs were placed on parole for sex offenses prior to the enactment of the GPS statute and thus the ex post facto clause prevents the enforcement of the statute against them.

*Doe, et al. v. Chairperson of the Massachusetts Parole Board, et al.* (Lawyers Weekly No. 10-145-09) (2 pages) (Rescript) Appealed from a decision by Troy, J., in Superior Court. Beth L. Eisenberg (Patricia L. Garin, of Stern, Shapiro, Weissberg & Garin, with her) for the plaintiffs; Scott A. Katz for the defendants; Stephan Fenton and Stephen R. Kaplan, amici curiae, submitted a brief (Docket No. SJC-10239) (Aug. 18, 2009).

## Sexually dangerous person

Where a defendant has appealed a decision in which a judge found him to be a sexually dangerous person and ordered him committed to the Massachusetts Treatment

Center for an indeterminate period from one day to life, we hold that the decision should be affirmed, as no merit exist to the defendant's claim that no rational trier of fact could have found, beyond a reasonable doubt, the elements of sexual dangerousness as defined in G.L.c. 123A, §1.

*Commonwealth v. Cowen* (Lawyers Weekly No. 10-213-08) (10 pages) (Greaney, J.) Following an order of temporary commitment issued by Kane, J., the case was heard by McLaughlin, J., in the Superior Court. Frederic G. Bartmon, of Allison, Angier & Bartmon, for the defendant; David J. Gold for the commonwealth (Docket No. SJC-10212) (Dec. 10, 2008).

## Threatening to commit murder - Intimidation of judge

Where a defendant was charged with threatening to commit murder and intimidating a judge based on reports made by an attorney representing the defendant in a Juvenile Court proceeding about messages the defendant had left on the attorney's telephone answering machine after a judge ruled against the defendant on a visitation issue, we hold that the District Court acted permissibly in dismissing both charges for lack of probable cause.

*Commonwealth v. Gallant* (Lawyers Weekly No. 10-058-09) (12 pages) (Cordy, J.) Motion to dismiss heard by Sullivan, J.; case reported by Spina, J., sitting as single justice. Jane A. Sullivan for the commonwealth; Tom G. Vukmirovits for the defendant (Docket Nos. SJC-10194 and SJC-10350) (April 9, 2009).

## Witness - Leading questions - Oath

Where a jury convicted a defendant of murder in the first degree on theories of extreme atrocity or cruelty and deliberate premeditation, the conviction must be reversed because the judge erroneously permitted the commonwealth to question a witness who refused to take an oath and because the same witness was allowed to answer "no comment" to leading questions that contained highly prejudicial information.

*Commonwealth v. Stewart* (Lawyers Weekly No. 10-142-09) (23 pages) (Cowin, J.) Case tried before Connon, J., in Superior Court. John M. Thompson, of Thompson & Thompson, for the defendant on appeal; Thomas G. Shack III and Robert D. Moriarty for the commonwealth (Docket No. SJC-09742) (Aug 14, 2009).

## EDUCATION

### MIAA - Eligibility

Where a plaintiff has challenged the defendant Massachusetts Interscholastic Athletic Association's decision to deny her eligibility as an interscholastic swimmer, the plaintiff has shown no statutory or constitutional violation and consequently her challenge must be rejected.

*Mancuso, et al. v. Massachusetts Interscholastic Athletic Association, Inc.* (Lawyers Weekly No. 10-015-09) (26 pages) (Cowin, J.) Motions for partial judgment on the pleadings and for summary judgment heard by Borenstein, J., and case tried before Donovan, J., in Superior Court. Paul J. Klehm and James B. Krasnoo, both of Krasnoo/Klehm, for the plaintiffs; James P. Long for the defendant; the following submitted briefs for

*amici curiae: William E. Quirk and Anthony W. Bonuchi for National Federation of State High School Associations; Peter M. Kelley and Stephen J. Finnegan for Boston Public School Department and another; Martha Coakley and Sookyoung Shin, Assistant Attorney General, for the commonwealth; Michael J. Long and Amy L. Leuchte, both of Long & Dipietro, for Massachusetts Association of School Superintendents* (Docket No. SJC-10151) (Jan. 23, 2009).

## EMPLOYMENT

### Class action - Rest and meal breaks

Where the plaintiffs, hourly employees of the defendant, filed a putative class action on behalf of themselves and others similarly situated alleging that the defendant wrongfully withheld compensation for time worked and denied or cut short rest and meal breaks to which they were entitled, we conclude that the judge abused his discretion in allowing the defendant's motions to exclude the testimony of the plaintiffs' expert and to decertify the class.

*Salvas, et al. v. Wal-Mart Stores, Inc.* (Lawyers Weekly No. 10-169-08) (58 pages) (Marshall, C.J.) Motions for exclusion of certain expert testimony, for decertification of the class and for partial summary judgment heard by Murtagh, J., and questions of law reported by him to the Appeals Court. Carolyn Beasley Burton, of California, and Robert J. Bonsignore for the plaintiffs; Charles R. Eskridge III, of Texas, Donald R. Frederico, of Greenberg Traurig, and Kathryn P. Hoek for the defendant; Ben Robbins, Martin J. Newhouse and Jo Ann Shotwell Kaplan for New England Legal Foundation & another, amici curiae, submitted a brief; Shannon Liss-Riordan and Hillary Schwab, of Pyle, Rome, Lichten, Ehrenberg & Liss-Riordan, and Philip J. Gordon, Audrey R. Richardson and Catherine K. Ruckelshaus for Massachusetts Employment Lawyers Association & others, amici curiae, submitted a brief (Docket No. SJC-10108) (Sept. 23, 2008).

### Discrimination - Employer with fewer than six employees

Where a judge dismissed a sex discrimination claim brought pursuant to the Massachusetts Equal Rights Act (G.L.c. 93, §102) against a defendant employer who had fewer than six employees and thus was not subject to G.L.c. 151B, the dismissal order must be vacated, as "an employee may assert a sex discrimination claim under MERA where an employer is not within the ambit of G.L.c. 151B."

*Thurdin v. SEI Boston, LLC* (Lawyers Weekly No. 10-175-08) (50 pages) (Ireland, J.) (Botsford, J., with whom Marshall, C.J., and Greaney, J., join, concurring) (Cordy, J., with whom Cowin, J., joins, dissenting) Motion to dismiss was heard by Cratsley, J., in Superior Court. Daniel W. Rice, of Glynn, Landry & Rice, for the plaintiff; Joseph S. Berman and Kenneth J. Rodriguez, both of Looney & Grossman, for the defendant; the following submitted briefs for amici curiae: James S. Weliky, of Messing, Rudavsky & Weliky, for Massachusetts Employment Lawyers' Association and others; Jo Ann Shotwell Kaplan and Martin Newhouse for New England Legal Foundation and others; Patricia A. Washienko, of Yarashus, Wagner, Cook, Freiberger, and Anne Josephson, of Kotin, Crabtree & Strong, for Union of Minority Neighborhoods and others (Docket No. SJC-10123) (Oct. 24, 2008).

### Discrimination - MCAD complaint

Where (1) a plaintiff alleged that the defendant employer discriminated against him by not permitting him to return to

## EMPLOYMENT

Continued from page 35

work as a commercial truck driver after his discharge from a psychiatric hospital in 1996 and (2) a jury found that the defendant had acted lawfully in 1996-1997, but had discriminated against the plaintiff by refusing to reinstate him in 1999, we conclude that the plaintiff's 1999 claims should not have been allowed to go to the jury because he did not file a complaint with the Massachusetts Commission Against Discrimination related to those claims.

*Everett v. The 357 Corp., et al.* (Lawyers Weekly No. 10-060-09) (38 pages) (Marshall, C.J.) Case tried before Grabau, J., in Superior Court. Gary M. Feldman, of Davis, Malm & D'Agostine, for the defendants; Jeffrey M. Feuer and Lee D. Goldstein, both of Goldstein & Feuer, for the plaintiff; Beverly I. Ward, for Massachusetts Commission Against Discrimination, amicus curiae, submitted a brief; Nina Joan Kimball, of Kimball Brousseau, for Charles Hamilton Houston Institute for Race & Justice and others, amici curiae, submitted a brief (Docket No. SJC-10238) (April 13, 2009).

### Discrimination - Religion - Facial hair

Where (1) a plaintiff filed a complaint in Superior Court pursuant to G.L.c. 151B, §4(1A), claiming that a new grooming policy at one of the defendant's businesses, which required all employees who had customer contact to be clean shaven, discriminated against the plaintiff due to his religion and (2) summary judgment was awarded in favor of the defendant based on the judge's conclusion that, as a matter of law, an exemption from the grooming policy would constitute an undue hardship because the defendant had a right to control its public image, the judgment must be vacated and the case remanded, as the defendant failed to prove an undue hardship.

*Brown v. F.L. Roberts & Co., Inc.* (Lawyers Weekly No. 10-205-08) (21 pages) (Ireland, J.) Case heard by Josephson, J., on motions for summary judgment. Joel Feldman, of Heisler, Feldman & McCormick, for the plaintiff; Claire L. Thompson and Rebecca L. Bouchard, both of Doherty, Wallace, Pillsbury & Murphy, for the defendant; Beverly I. Ward, for Massachusetts Commission Against Discrimination, amicus curiae, submitted a brief; Joel Eigerman, Sarah Wunsch and Sara Smolik, of Rodgers, Powers & Schwartz, submitted a brief for American Civil Liberties Union of Massachusetts and others, amici curiae (Docket No. SJC-10155) (Dec. 2, 2008).

### Misclassification - Contractor

Where a plaintiff's complaint, alleging that the defendant employer had misclassified him as an independent contractor rather than an employee, was dismissed on the ground that the plaintiff incurred no damages as a result of any misclassification, the dismissal order must be vacated according to the plain meaning and primary purpose of the governing statutes.

*Somers v. Converged Access, Inc., et al.* (Lawyers Weekly No. 10-148-09) (29 pages) (Gants, J.) Case heard by Smith, J., on motions for summary judgment. Harold L. Lichten and Shannon Liss-Riordan, both of Lichten & Liss-Riordan, for the plaintiff; Karla E. Zarbo for the commonwealth; Christopher R. O'Hara (Matthew J. Fogelman, both of Todd & Weld, for the defendants; Donald Siegel and Nicole Horberg Decter, both of Segal Roitman, submitted a brief for Massachusetts Building Trades Council and another, amici curiae (Docket No. SJC-10347) (Aug. 21, 2009).

### Overtime compensation

Where a defendant employer calculated overtime wages using a regular hourly rate less than the prevailing wage eligible

employees must be paid, the defendant violated the prevailing overtime wage law (G.L.c. 151, §1A).

We so decide in response to a question reported by a Superior Court judge.

*Mullally, et al. v. Waste Management of Massachusetts, Inc.* (Lawyers Weekly No. 10-183-08) (13 pages) (Spina, J.) Motions for summary judgment heard by Grabau, J., and questions of law reported by him to the Appeals Court; application for direct appellate review granted by the Supreme Judicial Court. Paul E. Nemser, of Goodwin Procter, for the defendant; F. Henry Ellis III for the plaintiffs; Donald Siegel and Nicole Horberg Decter, both of Segal Roitman, submitted a brief for Massachusetts Building Trades Council, amicus curiae; Karla E. Zarbo submitted a brief for the commonwealth and another, amici curiae (Docket No. SJC-10181) (Nov. 6, 2008).

### Turnpike - Sick leave benefits

Where a plaintiff employee of the defendant Massachusetts Turnpike Authority retired in 2002, he was entitled to incentive program benefits as they existed when he earned them, prior to a 1996 revision of the program that called for a reduction in benefit amounts.

*LeMaitre v. Massachusetts Turnpike Authority* (Lawyers Weekly No. 10-212-08) (5 pages) (Cordy, J.) Case heard by

## Justice Francis X. Spina



Appointed to SJC: 1999

Will reach retirement age: 2016

Majority opinions written this year: 31

Concurring opinions written this year: 1

Dissenting opinions written this year: 1

Concurrences joined in: 1

Dissents joined in: 1

**Notable decision:** *In the Matter of a Grand Jury Investigation* (Lawyers Weekly No. 10-049-09), which ruled privileged messages left by a client on his counsel's telephone answering machine threatening harm to others

*Carhart, J., on motions for summary judgment. Michael B. Keating and David A. Klufft, both of Foley Hoag, for the defendant; Nicole B. Caprioli, of Christopher, Hays, Wojcik & Mavricos, for the plaintiff* (Docket No. SJC-10162) (Dec. 10, 2008).

### Wage Act - Tips - 'Skycaps'

Where (1) a defendant airline began in 2005 to impose a charge on customers choosing curbside luggage check-in, (2) the charge was challenged by plaintiff "skycaps" and (3) a jury found in favor of the plaintiffs on their Massachusetts Wage Act claim, the verdict should be upheld even as to plaintiffs not directly employed by the defendant.

*DiFiore, et al. v. American Airlines, Inc.* (Lawyers Weekly No. 10-137-09) (18 pages) (Gants, J.) Certification of a question of law to the Supreme Judicial Court by the United States District Court for the District of Massachusetts. Shannon Liss-Riordan and Hillary Schwab, both of Lichten & Liss-Riordan, for the plaintiffs; Amy Cashore Mariani and Michael A. Fitzhugh, both of Fitzhugh & Mariani, for the defendant; the following submitted briefs for amici curiae: David J. Kerman, Matthew A. Porter and Douglas J. Hoffman, all of Jackson Lewis, for Air Transport Association of America, Inc.; John Pagliaro, Martin J. Newhouse and Jo Ann Shotwell Kaplan for New England Legal Foundation and another; Catherine K. Ruckelshaus, of New York, Philip J. Gordon and Audrey R. Richardson for Massachusetts Employment Lawyers Association and others (Docket No. SJC-10313) (Aug. 4, 2009).

### Wage Act - Unused vacation - Discharge

Where an employer's written vacation pay policy did not provide for employees to be paid for unused vacation time remaining at the time of involuntary discharge, the policy did not comply with the Wage Act.

*Electronic Data Systems Corp. v. Attorney General, et al.* (Lawyers Weekly No. 10-099-09) (13 pages) (Botsford, J.) Case heard by Nancy Staffier Holtz, J., on a motion for judgment on the pleadings. Robert P. Morris, of Morgan, Brown & Joy, for the plaintiff; Kevin Conroy Marsha Hunter for the Attorney General; the following submitted briefs for amici curiae: Ben Robbins, Martin J. Newhouse and Jo Ann Shotwell Kaplan for New England Legal Foundation and others; Sherley E. Cruz and Cynthia Mark for Greater Boston Legal Services; Philip J. Gordon for National Employment Lawyers Association, Massachusetts Chapter (Docket No. SJC-10260) (June 11, 2009).

### Weekly wage act - Employee stock plan - Forfeiture provision

Where a U.S. District Court judge has certified a question asking whether a forfeiture provision in an employee stock plan offered by the defendants to their

Dean P. Nicastro, of Pierce & Mandell, and James T. Hilliard, of Connor & Hilliard, for Professional Liability Foundation, Ltd., and another, amici curiae, submitted a brief; Timothy C. Miller, of Texas, for Federation of State Medical Boards of the U.S., Inc., amicus curiae, submitted a brief (Docket No. SJC-10297) (Aug. 11, 2009).

### Expert - SDP - Discharge

Where a judge ordered the discharge of a person deemed sexually dangerous, the judge's order was proper in light of the testimony of two qualified examiners.

*Johnstone, petitioner* (Lawyers Weekly No. 10-057-09) (13 pages) (Cowan, J.) Case tried before Hamlin, J., in Superior Court. Mary P. Murray for the commonwealth; Robert E. Fox for the petitioner (Docket No. SJC-10279) (April 9, 2009).

### Prior convictions

Where a jury convicted a defendant of possession of a Class D substance (marijuana) with the intent to distribute, the conviction must be vacated because the trial judge's denial of the defendant's motion to exclude his prior convictions from the evidence was erroneous.

*Commonwealth v. Little* (Lawyers Weekly No. 10-080-09) (23 pages) (Cordy, J.) (Spina, J., dissenting) Case tried before Dinneen, J., in District Court. John J. Roemer on appeal for the defendant; Christine M. Kiggen for the commonwealth; David M. Siegel, for Suffolk Lawyers for Justice, amicus curiae, submitted a brief (Docket No. SJC-10256) (May 14, 2009).

### Wiretap - Jail

Where a Superior Court judge suppressed recorded outgoing telephone calls made from jail, the suppression order should be affirmed pursuant to G.L.c. 272, §99A.

*Commonwealth v. Long, et al.* (Lawyers Weekly No. 10-143-09) (26 pages) (Spina, J.) Motions to suppress evidence heard by Sanders, J., in Superior Court. Varsha Kukafka for the commonwealth; Bernard Grossberg for Deryck Long; Kevin M. Mitchell for Paul Brown (Docket No. SJC-10237) (Aug. 17, 2009).

## INSURANCE

### Duty to defend - Counsel fees

Where an insurance company successfully brought a declaratory judgment action establishing another insurer's duty to defend a policyholder, the successful insurer is not entitled to an award of the counsel fees incurred in prosecuting the declaratory judgment action.

*John T. Callahan & Sons, Inc., et al. v. Worcester Insurance Co.* (Lawyers Weekly No. 10-046-09) (8 pages) (Botsford, J.) Case heard by Chernoff, J., on motions for summary judgment, and a motion for entry of final judgment and award of attorney's fees also heard by him. Aaron R. White, of Boyle, Morrissey & Campo, for the plaintiffs; David F. Hassett and Scott T. Ober, both of Hassett & Donnelly, for the defendant (Docket No. SJC-10180) (March 19, 2009).

### Environmental - Prorated liability

Where the 1st U.S. Circuit Court of Appeals has certified a question regarding insurance coverage for environmental contamination, we respond by adopting the time-on-the-risk method of prorating liability.

*Boston Gas Co. v. Century Indemnity Co. v. Certain Underwriters at Lloyd's London, et al.* (Lawyers Weekly No. 10-127-09) (57 pages) (Cordy, J.) Guy A. Cellucci, of Pennsylvania, and Shane R. Heskin, of White &

## EVIDENCE

### Board of Registration in Medicine - Credentialing files

Where hospitals refused to provide information sought by the Board of Registration in Medicine, we conclude that the information must be provided pursuant to G.L.c. 111, §205(b).

*Board of Registration in Medicine v. Hallmark Health Corp., et al.* (Lawyers Weekly No. 10-141-09) (20 pages) (Marshall, C.J.) Case heard by Spurlock, J., on motions for summary judgment. Jennifer Grace Miller for the plaintiff. Joan Eldridge, of Foster & Eldridge, for the defendants; John J. Barter,

employees violates the weekly wage act, we answer in the negative.

*Weems v. Citigroup Inc., et al. (and a companion case)* (Lawyers Weekly No. 10-019-09) (15 pages) (Ireland, J.) Certification of a question of law to the Supreme Judicial Court by the United States District Court for the District of Massachusetts. Justin P. O'Brien and Michael A. Collora, both of Dwyer & Collora, for Johnnie F. Weems III and others; Preeta D. Bansal, of New York, David S. Clancy, of Skadden, Arps, Slate, Meagher & Flom, and Kara E. Fay for Citigroup Inc. and others; Martha Coakley and Karla E. Zarbo for the commonwealth, amicus curiae, submitted a brief (Docket No. SJC-10029) (Jan. 30, 2009).

# SJC

Williams, for the defendant; David L. Elkind, of the District of Columbia, and Ronald Macklin, of New York, for the plaintiff; JoAnn Horn Maynard, of Washington, for the third-party defendants; the following submitted briefs for amici curiae: Eugene R. Anderson, William G. Passannante and Carrie Maylor, of New York, and Amy Bach, of California, for United Policyholders; Richard Neumeier, of Morrison Mahoney, for Continental Casualty Company; Martin F. Gaynor III and Nicholas D. Stellakis, both of Cooley Manion Jones, for A.W. Chesterton Company; William F. Greaney, Deanna M. Wilcox and Gregory M. Lipper, of the District of Columbia, and Francis J. Sally and Andrea Peraner-Sweet, both of Sally & Fitch, for The Gillette Company; Peter G. Hermes, Kevin J. O'Connor and Michael S. Batson, all of Hermes, Netburn, O'Connor & Spearling, for America Insurance Company; Laura A. Foggan, Paul A. Dame and Parker J. Lavin, of the District of Columbia, and Richard Riley and William P. Mekrut, both of Murphy & Riley, for The American Insurance Association and others (Docket No. SJC-10246) (July 24, 2009).

## Intellectual property exclusion

Where the holder of a professional liability policy, after settling a claim with a client from whom sensitive documents were taken while in the policyholder's care, commenced an action seeking a declaratory judgment that the insurer had a duty to indemnify the policyholder, a ruling for the insurer must be affirmed based on this court's conclusion that the policy's exclusion for "any claim arising out of any misappropriation of trade secret" applies.

*Finn v. National Union Fire Insurance Co. of Pittsburgh, Pennsylvania, et al.* (Lawyers Weekly No. 10-206-08) (13 pages) (Spina, J.) Case heard by Hines, J., on motions for judgment on the pleadings and for partial summary judgment. Steven L. Schreckinger and Jane M. Guevremont, both of Lynch, Brewer, Hoffman & Fink, for the plaintiff; John D. Hughes, of Edwards, Angell, Palmer & Dodge, for the defendants (Docket No. SJC-10153) (Dec. 2, 2008).

## JUDGES

### Public reprimand

Where a judge sent two letters to the publisher of a newspaper concerning a libel suit the judge had brought against the newspaper, the judge should be publicly reprimanded and assessed costs for his misconduct in the present case.

*In the Matter of Murphy, Ernest B.* (Lawyers Weekly No. 10-216-08) (11 pages) (Order of Court) A hearing was held before a hearing officer appointed by this court, a report was submitted by the hearing officer to the Commission on Judicial Conduct, and a report and recommendation for discipline was submitted by the commission to this court. Michael E. Mone Sr., of Esdaile, Barrett & Esdaile, for Ernest B. Murphy; Howard V. Neff III for Commission on Judicial Conduct (Docket No. SJC-10179) (Dec. 18, 2008).

## JURY AND JURORS

### Consent to trial by jury of five

Where a defendant, after consenting to proceeding with only five jurors, was acquitted of operating while under the influence of alcohol, the commonwealth cannot now prosecute the defendant on the same charges.

A decision by the trial judge, denying the commonwealth's motion to return the case to the trial list, is upheld.

*Commonwealth v. Dery* (Lawyers Weekly No. 10-219-08) (4 pages) (Cordy, J.) Case

reported by Cowin, J., sitting as single justice. Judith Ellen Pietras for the commonwealth; David G. Mintz and Susan Moran for the defendant; Carlo A. Obligato and William C. Newman, for Committee for Public Counsel Services and another, amici curiae, submitted a brief (Docket No. SJC-10143) (Dec. 23, 2008).

### G.L.c. 211 petition - Defense inquiry

Where the commonwealth filed a G.L.c. 211, §3 petition after a trial judge allowed a defense motion to inquire into possible extraneous influences on the jury in a criminal prosecution, a single justice did not err in denying the petition despite the commonwealth's assertion that no other avenue of relief is available to it.

*Commonwealth v. Richardson* (Lawyers Weekly No. 10-100-09) (3 pages) (Rescript) Petition heard by Botsford, J., sitting as single justice. Robert C. Thompson for the commonwealth; John S. Redden for the defendant (Docket No. SJC-10334) (June 11, 2009).

### Mistrial - Deliberations

Where a defendant was convicted by a Superior Court jury of distributing heroin in a school zone, the conviction should not be reversed, as the trial judge committed no abuse of discretion in denying the defendant's motion for a mistrial based on a juror's irregular behavior.

*Commonwealth v. Torres* (Lawyers Weekly No. 10-074-09) (21 pages) (Marshall, C.J.) Cases tried before Carhart, J., in Superior Court. Andrew S. Crouch for the defendant; Dianne M. Dillon for the commonwealth (Docket No. SJC-10235) (May 5, 2009).

## JUVENILE

### Commitment - Extension

Where three juveniles who had been committed to the care of the Department of Youth Services were subjected to three-year commitment extensions beyond their eighteenth birthdays pursuant to G.L.c. 120, §§ 17-19, we find that the statute under which the extensions were ordered is unconstitutional.

*Kenniston, et al. v. Department of Youth Services, et al.* (Lawyers Weekly No. 10-021-09) (17 pages) (Cowin, J.) Case reported by Cordy, J., sitting as single justice. Barbara Kaban and Robert D. Fleischer for Cameron Kenniston and others; Pamela L. Hunt and Randall E. Ravitz for Department of Youth Services; Erica E. Cushna, for Jonathan Maldonado, was present but did not argue; Sharon N. Chaitin-Pollak, for Steve Stephen, was present but did not argue; Jennifer Honig, William Landers, Frank Laski, Francine Sherman and Marsha Levick for The Mental Health Legal Advisors Committee and others, amici curiae, submitted a brief (Docket No. SJC-10270) (Feb. 10, 2009).

### Selective prosecution - Discovery

Where a juvenile charged with sexual offenses sought discovery from the commonwealth in order to investigate and, if possible, support his claim that he was being selectively prosecuted because of his gender, an order granting that request should be affirmed.

*Commonwealth v. Bernardo B., a juvenile* (Lawyers Weekly No. 10-020-09) (28 pages) (Marshall, C.J.) (Spina, J., with whom Cowin, J., joins, dissenting) Case heard by Botsford, J., sitting as single justice. Michael Sheehan for the commonwealth; Janice Bassil and Michael J. Traft, both of Carney & Bassil, for the juvenile; Corinne Schiff, Mie Lewis and Lenora M. Lapidus, of New York, and Sarah Wunsch for American Civil Liberties Union Foundation of Massachusetts and others, amici curiae, submitted a brief (Docket No. SJC-10293) (Feb. 6, 2009).

## LABOR

### Police - Public safety exemption

Where the Labor Relations Commission found that that the city of Boston's unilateral decision to adopt the partial public safety exemption under the Federal Fair Labor Standards Act, for the purpose of computing future overtime compensation owed to city police officers, constituted a breach of the city's duty to bargain with the union in good faith under G.L.c. 150E, §10(a), this court agrees, as the state-law duty to bargain is not preempted.

*City of Boston v. Commonwealth Employment Relations Board, et al.* (Lawyers Weekly No. 10-043-09) (20 pages) (Cowin, J.) Appeal from a decision of the Labor Relations Commission. Robert J. Boyle Jr. (John Foskett, of Deutsch, Williams, Brooks, DeRensis & Holland, with him) for the plaintiff; Bryan C. Decker and Patrick Bryant, both of Sandulli Grace, for the intervenor; Cynthia A. Spahl, for the defendant, submitted a brief; Ira Fader, for Massachusetts Teachers Association, amicus curiae, submitted a brief; Philip Collins, Tim D. Norris and Daniel C. Brown, all of Collins, Loughran & Peloquin, for Massachusetts Municipal Association, amicus curiae, submitted a brief (Docket No. SJC-10216) (March 16, 2009).

## LANDLORD AND TENANT

### Crime - Disability

Where a Housing Court judge awarded possession of a tenant's apartment to the Boston Housing Authority based on a finding that the tenant had violated a provision of his lease by "committing a crime on the public housing development grounds that threatened the health and safety of another resident," a remand must be ordered in light of the tenant's mental disability.

*Boston Housing Authority v. Bridgewater* (Lawyers Weekly No. 10-003-09) (25 pages) (Marshall, C.J.) Case heard by Pierce, J., and posttrial motions heard by him. Ann Jochnick, Richard M.W. Bauer and James M. McCreight for the defendant; Jay S. Kopleve for the plaintiff; the following submitted briefs for amici curiae: Thomas P. Murphy for Disability Law Center & others; Paul R. Collier III and Esme Caramello for Massachusetts Coalition for the Homeless and others; Susan Ann Silverstein & Michael Schuster for AARP; Susan C. Cohen and Lisa L. Walker for Cambridge Housing Authority and another; Amy Copperman and Judith Liben for Massachusetts Union of Public Housing Tenants (Docket No. SJC-10107) (Jan. 7, 2009).

## Public housing - Arrest

Where a plaintiff, after being arrested and charged with engaging in sexual conduct for a fee, G.L.c. 272, §53A, and keeping a house of ill fame, G.L.c. 272, §24, was notified that the Fall River Housing Authority was terminating her participation in the Section 8 rent subsidy program, that termination order must be vacated because the Authority failed to comply with applicable U.S. Department of Housing and Urban Development regulations in several respects.

*Costa v. Fall River Housing Authority, et al.* (Lawyers Weekly No. 10-061-09) (25 pages) (Botsford, J.) Case heard by Chaplin, J., on motions for summary judgment. John Egan for the defendant; Kenneth W. Salinger for the intervenor Attorney General; Deborah G. Rother for the plaintiff. The following submitted briefs for amici curiae: James M. McCreight for Boston Tenants Coalition and others; David B. Gleich for the Boston Housing Authority and others; Michael J. Sullivan, Anita L. Johnson, Barbara C. Biddle, John C. Koppel, Thomas W. Rodick and David M. Reizes for the United States; Richard M. Bluestein, Janet Steckel Lundberg and Anthony J. Cichello, all of Krokidas & Bluestein, for Massachusetts Nonprofit Housing Association, Inc. (Docket No. SJC-10197) (April 13, 2009).

## Sheriff - Lease termination

Where the sheriff of Suffolk County terminated a ten-year lease after the sheriff lost outside funding three years into the lease, the sheriff acted lawfully.

*Morton Street LLC, et al. v. Sheriff of Suffolk County, et al.* (Lawyers Weekly No. 10-052-09) (14 pages) (Gants, J.) Case heard by Hinkle, J. on motions for summary judgment. Sander A. Rikleen and Hillary B. Dudley, both of Edwards, Angell, Palmer & Dodge, for the plaintiffs; Russell T. Homsy for the defendants (Docket No. SJC-10318) (March 31, 2009).

## LICENSES AND PERMITS

### Nursing - Discipline

Where a nurse has filed an appeal challenging a single justice's order remanding a reciprocal discipline proceeding to the Board of Registration in Nursing, the appeal is interlocutory and must accordingly be dismissed.

*Lankheim v. Board of Registration in Nursing* (Lawyers Weekly No. 10-108-09) (3 pages) (Rescript) Appealed from a decision by Spina, J., sitting as single justice. Nancy Sue Keller, of Jacobi & Chamberlain, for the plaintiff; Amy Spector for the defendant (Docket No. SJC-10367) (June 19, 2009).

## Public accountancy license

Where the defendant Board of Registration in Public Accountancy suspended the plaintiff's license to practice for three years, we hold that the defendant acted permissibly based on the plaintiff's felony conviction (for larceny over \$250) and his false statement, on his license renewal application, that he had not been found guilty of any criminal offense.

*Kaplan v. Board of Registration in Public Accountancy* (Lawyers Weekly No. 10-203-08) (4 pages) (Rescript) Appealed from a decision issued by Ireland, J., sitting as single justice. Deirdre H. Robbins for the plaintiff; Timothy J. Casey for the defendant (Docket No. SJC-10192) (Nov. 26, 2008).

## MUNICIPAL

### Burial permit charge

Where the Appeals Court found that a charge assessed by certain municipalities for the issuance of a burial permit is an

## MUNICIPAL

Continued from page 37

unlawful tax, we conclude to the contrary that the burial permit charge is a valid regulatory fee.

A declaratory judgment in favor of the defendant municipalities shall enter.

*Silva v. City of Attleboro, et al.* (Lawyers Weekly No. 10-114-09) (12 pages) (Cowin, J.) Case heard by Chin, J., on an agreed statement of facts. Irene B. Schall, of Stanford & Schall, for city of New Bedford; Robert S. Mangiaratti, of Murphy, Hesse, Toomey & Lehane, for city of Attleboro; Martin A. Silva for the plaintiff; Steven A. Torres and Jane E. Estey, for city of Taunton, submitted a brief; Martha Coakley and Peter Sacks, for the commonwealth, amicus curiae, submitted a brief; Juliana deHaan Rice and Thomas J. Urbelis, of Urbelis & Fieldsteel, for City Solicitors & Town Counsel Association, amicus curiae, submitted a brief (Docket No. SJC-10330) (June 26, 2009).

## Community Preservation Act - Parks

Where 10 taxpayers of the city of Newton commenced an action for declaratory and injunctive relief in the Superior Court, challenging the legality of Newton's appropriation of \$765,825 in funds pursuant to the Massachusetts Community Preservation Act, G.L.c. 44B, for various projects at Stearns Park and Pellegrini Park, a judgment in the taxpayers' favor must be affirmed, as the appropriation did not come within the scope of the CPA.

*Seideman, et al. v. City of Newton* (Lawyers Weekly No. 10-176-08) (13 pages) (Spina, J.) Case heard by Henry, J., on a motion for summary judgment. Donalyn B. Lynch Kahn and Daniel Funk for the defendant; Guive Mirfendereski for the plaintiffs; Stephen D. Anderson, Kevin D. Batt and Nina Pickering, all of Anderson & Kreiger, for town of Acton, amicus curiae, submitted a brief (Docket No. SJC-10135) (Oct. 24, 2008).

## NEGLIGENCE

### Diocese - Rector's relationship with parishioner

Where a plaintiff filed an action making various claims against the defendants — the Episcopal Diocese of Massachusetts and three of its bishops — in connection with the plaintiff's involvement in a sexual relationship with the then rector of her parish, a judgment for the defendants must be affirmed because the evidence did not establish that they breached any legal duty they may have owed to the plaintiff.

*Petrell v. Shaw, et al.* (Lawyers Weekly No. 10-042-09) (16 pages) (Ireland, J.) Case heard by Muse, J., on motions for summary judgment. Donald L. Gibson, of Driscoll & Gibson, for the plaintiff; Charles P. Kirdregan for the defendants (Docket No. SJC-10210) (March 16, 2009).

### Independent contractor - Control - Jurors' discussion of evidence

Where a jury found three defendants liable for the death of a bus passenger, the judgment should be affirmed, as (1) the defendants suffered no prejudice from the trial judge's decision to allow the jurors to discuss evidence among themselves during the course of the trial and (2) a jury instruction on "control" of an independent contractor was not improper.

*Kelly v. Foxboro Realty Associates, LLC, et al.* (and a companion case) (Lawyers Weekly No. 10-122-09) (17 pages) (Cordy,

J.) Cases tried before Brassard, J., in Superior Court. Myles W. McDonough, of Sloane & Walsh, for Foxboro Realty Associates, LLC; John A.K. Grunert, of Campbell, Campbell, Edwards & Conroy, for Apollo Security, Inc; Andrew C. Meyer Jr. and Adam R. Satin, both of Lubin & Meyer, for Janice Kelly (Docket No. SJC-10294) (July 16, 2009).

### Livery service

Where a private carrier for hire permits a passenger to consume alcoholic beverages (not purchased or supplied by the carrier) while traveling in one of its vehicles, it may be liable for a death and serious personal injuries caused shortly thereafter by the passenger's negligent operation of a motor vehicle while under the influence of alcohol.

*Commerce Insurance Company v. Ultimate Livery Service, Inc., et al.* (and four companion cases) (Lawyers Weekly No. 10-204-08) (31 pages) (Greaney, J.) (Cordy, J., joined by Marshall, C.J., and Botsford, J., concurring in the judgment) Case heard by Brady, J., after the consolidation of cer-

*Pollock & Sheehan, and Chad P. Brouillard, of Foster & Eldridge, for Massachusetts Defense Lawyers Association; Mary Jane McKenna and J. Michael Conley, of Kenney & Conley, for Massachusetts Academy of Trial Attorneys; John J. Barter for Professional Liability Foundation, Ltd.* (Docket No. SJC-10296) (June 9, 2009).

### Non-profit association

Where a 12-year-old plaintiff was injured while participating in a youth soccer program conducted by the defendant non-profit association, the defendant cannot be held liable for negligence, as the defendant is immune under G.L.c. 231, §85V.

*Welch v. Sudbury Youth Soccer Association, Inc., et al.* (Lawyers Weekly No. 10-036-09) (8 pages) (Spina, J.) Case heard by Curran, J., on a motion for judgment on the pleadings. Theresa K. Capobianco, of Capobianco and Capobianco, for the plaintiff; Joseph F. Leighton Jr., of Wilson, Elser, Moskowitz, Edelman & Dicker, for the defendants (Docket No. SJC-10242) (March 9, 2009).

## Justice Robert J. Cordy



Appointed to SJC: 2001

Will reach retirement age: 2019

Majority opinions written this year: 21

Concurring opinions written this year: 2

Concurring in the judgment opinions written this year: 1

Dissenting opinions written this year: 2

Concurrences joined in: 1

Concurring in the judgment opinions joined in: 1

Concurring in part, dissenting in part opinions joined in: 1

**Notable decision:** *Commonwealth v. Powell* (Lawyers Weekly No. 10-034-09), which held that a Superior Court judge may, under certain circumstances, dismiss a valid indictment, after accepting a guilty plea, by "continuing the case without a finding" and imposing conditions

*tain tort and insurance coverage claims; entry of separate and final judgments on the tort claims ordered by Connolly, J., in the Superior Court. Michael B. Bogdanow, of Meehan, Boyle, Black & Bogdanow, for Sharlene Waters; Kenneth F. Rosenberg, of Fuller, Rosenberg, Palmer & Beliveau, for Ultimate Livery Service, Inc., et al.; John F. Hurley Jr., of Pojani, Hurley, Ritter & Salvidio, for Commerce Insurance Company; Darin L. Wessell submitted a brief for Taxicab, Limousine & Paratransit Association, amicus curiae (Docket No. SJC-10149) (Nov. 26, 2008).*

### Medical provider - Duty to third party

Where a plaintiff police officer, who was injured while responding to an emergency report of a pedestrian-automobile accident, brought a negligence action alleging that the accident was caused by the defendant hospital's negligent release of the pedestrian without an escort following a colonoscopy, the complaint was correctly dismissed on the ground that the hospital did not owe plaintiff any duty of care.

*Leavitt v. Brockton Hospital, Inc., et al.* (Lawyers Weekly No. 10-096-09) (16 pages) (Marshall, C.J.) (Cowin, J., with whom Cordy and Botsford, JJ., join, concurring in the judgment) Motion to dismiss heard by Frank M. Gaziano, J., in Superior Court. Jeffrey S. Beeler, of Heinlein & Beeler, for the plaintiff; Daniel J. Buoniconiti, of Foster & Eldridge, for the defendants; the following submitted briefs for amici curiae: Michael D. Riseberg, of Adler,

## PARENT AND CHILD

### Temporary transfer of custody - Mootness

Where parents have appealed a single justice's decision letting stand an order temporarily transferring custody of their children to the Department of Children and Families, we hold that the appeal should be dismissed on mootness grounds.

*Care and Protection of Torrence, et al.* (Lawyers Weekly No. 10-105-09) (3 pages) (Rescript) Appealed from a judgment entered by Ireland, J., sitting as single justice. Raffaella C. Hanley for the mother; Dana Alan Curhan for the father; Lynne M. Murphy for the Department of Children and Families; Andrew L. Cohen and Jeanne M. Rhinehart for the children (Docket No. SJC-10161) (June 18, 2009).

### Termination of parental rights - Visitation

Where a judge terminated the parental rights of a child's biological mother and father and approved of postadoption visitation with the child's father but did not order it, a remand is necessary because the judge should have entered a specific order or orders for posttermination and postadoption visitation or contact between the child and the father.

*Adoption of Rico* (Lawyers Weekly No. 10-076-09) (15 pages) (Botsford, J.) Case heard by Rebekah J. Crampton Kamukala, J., in Juvenile Court. Robert E. Young for the child; Jeanne M. Kaiser for the father; Annapurna Balakrishna for Department of Children and Families; Andrew L. Cohen, for Committee for Public Counsel Services, amicus curiae, submitted a brief (Docket No. SJC-10280) (May 7, 2009).

## PUBLIC UTILITIES

### Electric company - Bad debt expense

Where the Department of Public Utilities approved a change in the way Fitchburg Gas and Electric Light Company, doing business as Unilite, recovers gas and electric supply-related bad debt expense, that order must be vacated because the requirements of G.L.c. 164, §94 were not met.

*Attorney General v. Department of Public Utilities* (Lawyers Weekly No. 10-024-09) (17 pages) (Botsford, J.) Case reported by Greaney, J., sitting as single justice. Alexander J. Cochis and Joseph W. Rogers for the plaintiff; John E. Bowman Jr. for the defendant; Scott J. Mueller and Meabh Purcell, both of Dewey & LeBoeuf, for Fitchburg Gas and Electric Light Company (Docket No. SJC-10110) (Feb. 11, 2009).

### Oil pipeline - Eminent domain

Where the Energy Facilities Siting Board determined that it had the power to authorize an oil pipeline company to take land by eminent domain for a pipeline already in existence, that conclusion was in error, as the statutory scheme allows the Board to authorize a taking only in connection with the construction of new oil pipelines.

*Providence and Worcester Railroad Co. v. Energy Facilities Siting Board, et al.* (Lawyers Weekly No. 10-016-09) (16 pages) (Cowin, J.) Motion to intervene considered by Botsford, J., and case reported by her. Gerald J. Petros, of Hinckley, Allen & Snyder, and David S. Rosenzweig, of Keegan Werlin, for the plaintiff; Stephen J. Brake and Sarah P. Kelly, both of Nutter McClennan & Fish, for intervener Mobil Pipe Line Co. (Docket No. SJC-10214) (Jan. 27, 2009).

### Standing - Renewable energy

Where a complaint was filed seeking rescission of an energy facility's authorization to participate in the commonwealth's renewable energy portfolio standard program, the complaint was correctly dismissed for lack of standing.

*Indeck Maine Energy, LLC, et al. v. Commissioner of Energy Resources, et al.* (Lawyers Weekly No. 10-140-09) (25 pages) (Cordy, J.) Motions to dismiss heard by Allan van Gestel, J., in Superior Court. William J. Dodge, of Vermont, for the plaintiffs; Sookyoung Shin for the defendant; M. Curtis Wittaker, of New Hampshire, for interveners Greenville Steam Company and Borallex Livermore Falls, Inc. (Docket No. SJC-10332) (Aug. 11, 2009).

## REAL PROPERTY

### Subdivision plan

Where a judge vacated a decision by the Ipswich planning board to approve a definitive subdivision plan, we disagree with some of the judge's conclusions and therefore remand the case to Superior Court.

*Krafchuk, et al. v. Planning Board of Ipswich, et al.* (Lawyers Weekly No. 10-056-09) (24 pages) (Ireland, J.) Cases heard by Welch, J., in Superior Court. Douglas H. Wilkins, of Anderson & Kreiger, for Edward P. Fagan and another; James G.

*Gilbert, of Tinti, Quinn, Grover & Frey, for Elizabeth E. Krafchuk and another; Benjamin Fierro III, of Lynch & Fierro, for Home Builders Association of Massachusetts, Inc., amicus curiae, submitted a brief (Docket No. SJC-10224) (April 7, 2009).*

## RETIREMENT

### Accidental disability - Heart attack

Where a defendant city employee suffered a permanently disabling heart attack at home within one hour of experiencing emotional distress upon being told, while at work, that her employment was going to be eliminated in the upcoming budget, we hold that she was disabled by a "personal injury sustained ... as a result of, and while in the performance of," her employment duties and therefore that she was entitled to benefits under the accidental disability retirement statute (G.L.c. 32, §7(1)).

*Retirement Board of Salem v. Contributory Retirement Appeal Board, et al. (Lawyers Weekly No. 10-032-09) (9 pages) (Botsford, J.) Case heard by Lu, J., on a motion for judgment on the pleadings. William J. Lundregan for the plaintiff; Paul F. Applebaum for defendant Claire Cole (Docket No. SJC-10215) (Feb. 24, 2009).*

### Disability - Revision of essential job duties

Where a Superior Court judge affirmed the denial by the Contributory Retirement Appeal Board of a Turnpike Authority employee's application for accidental disability retirement benefits pursuant to G.L.c. 32, §7(1), that decision should be affirmed given the plaintiff's ability to perform the essential duties of his position.

*Foresta v. Contributory Retirement Appeal Board, et al. (Lawyers Weekly No. 10-066-09) (22 pages) (Gants, J.) Case heard by Giles, J., on a motion for judgment on the pleadings. James W. Stone, of Stone & Stone, and Bernard J. Mulholland, of Ford, Mulholland & Moran, for the plaintiff; Walter M. Foster, of Sheehan, Phinney, Bass & Green, and Holly A. Ditchfield for Massachusetts Turnpike Authority Employees' Retirement Board; Jennifer Grace Miller for Contributory Retirement Appeal Board; the following submitted briefs for amici curiae: Scott C. Merrill, of Foley Hoag, for Lynn Retirement Board; Mary Jane McKenna, J. Michael Conley, of Kenney & Conley, and Deborah G. Kohl for The Massachusetts Academy of Trial Attorneys; John M. Becker, of Sandulli Grace, for Boston Police Patrolmen's Association and another (Docket No. SJC-10288) (April 24, 2009).*

### Pension - Forfeiture

Where the defendant Quincy retirement board ruled that a plaintiff's entitlement to a retirement allowance had been forfeited pursuant to G.L.c. 32, §15(4) as the result of his pleading guilty to the offenses of breaking and entering in the daytime with intent to commit a felony, stealing in a building and wanton destruction of property, we hold that the forfeiture did not amount to an excessive fine in violation of the Eighth Amendment to the U.S. Constitution.

*Maher v. Retirement Board of Quincy, et al. (Lawyers Weekly No. 10-184-08) (12 pages) (Ireland, J.) Proceedings had before Coven, J., and questions of law reported by him to the Appeals Court; the Supreme Judicial Court subsequently transferred the case on its own initiative. Frank J. McGee for the plaintiff; Michael Sacco for the defendant; Martha Coakley and Neil P. Olson submitted a brief for the Attorney General, et al., amici curiae (Docket No. SJC-10182) (Nov. 6, 2008).*

## SEARCH AND SEIZURE

### Automobile

Where a District Court judge allowed a defendant's suppression motion, the judge erred, as the relevant Massachusetts environmental police officer did not effect a seizure in the constitutional sense when he activated white "take down lights" on his vehicle to illuminate the area before approaching a parked automobile occupied by the defendant.

Order allowing suppression motion reversed; case remanded.

*Commonwealth v. Clark (Lawyers Weekly No. 10-193-08) (1 page) (Rescript)*

*(Cordy, J., with whom Cowin, J., joins, dissenting) Motion to suppress heard by McLaughlin, J., in Superior Court. Elizabeth Doherty and Douglas J. Darnbrough for the defendant; David J. Gold for the commonwealth (Docket No. SJC-10240) (March 19, 2009).*

### Drugs - Residence - Nexus

Where a Superior Court judge allowed the defendant's motion to suppress cocaine, marijuana, cash and other items seized by police officers during a search of the defendant's apartment, the suppression order should be affirmed for the reasons set forth in *Commonwealth v. Pina*, also decided today.

## Justice Margot G. Botsford



Appointed to SJC: 2007

Will reach retirement age: 2017

Majority opinions written this year: 20

Concurring opinions written this year: 1

Concurring in part, dissenting in part opinions written this year: 1

Concurrences joined in: 1

Concurring in the judgment opinions joined in: 2

Concurring in part, dissenting in part opinions joined in: 1

Dissents joined in: 2

**Notable decision:** *Commonwealth v. Fremont Investment & Loan, et al.* (Lawyers Weekly No. 10-209-08), which upheld a Superior Court injunction preventing a defendant lender from foreclosing on certain "subprime" loans

*Suppression motion heard by Goggins, J., in the District Court. Sarah E. Dolven for the defendant; Judith Ellen Pietras for the commonwealth (Docket No. SJC-10185) (Nov. 20, 2008).*

### Automobile - Delay in obtaining warrant

Where the police searched a vehicle after removing a suspected drug dealer from it, the evidence they found in the vehicle was correctly admitted at trial despite the officers' failure to obtain a search warrant.

*Commonwealth v. Eggleston (Lawyers Weekly No. 10-059-09) (22 pages) (Cowin, J.) (Cordy, J., concurring) (Ireland, J., joined by Marshall, C.J., dissenting) Motion to suppress heard by Ford, J., and cases heard by Agostini, J., in Superior Court. Wendy H. Sibbison for the defendant; Karen L. Carlo for the commonwealth (Docket No. SJC-10233) (April 10, 2009).*

### Drugs - Residence - Nexus

Where a Superior Court judge allowed the defendant's motion to suppress cocaine, marijuana, cash and other items seized by police officers during a search of the defendant's apartment, the suppression order should be affirmed on the ground that the affidavit supporting the search warrant fails to establish a nexus between the defendant's drug activity and his residence.

*Commonwealth v. Pina (Lawyers Weekly No. 10-048-09) (12 pages) (Ireland, J.)*

### Exit order - Frisk

Where a judge allowed a defendant's suppression motion, the judge erred, as the police were justified in this case in ordering the defendant out of a vehicle and frisking him.

*Commonwealth v. Goewey (Lawyers Weekly No. 10-171-08) (14 pages) (Marshall, C.J.) Pretrial suppression motion heard by Rutberg, J.; application for leave to prosecute interlocutory appeal allowed by Ireland, J., in the Supreme Judicial Court for the county of Suffolk and appeal was reported by him to the Appeals Court; after review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review. Joseph A. Pieropan for the commonwealth; Adriana Contartese and Dana Alan Curhan for the defendant (Docket No. SJC-10114) (Oct. 16, 2008).*

### Firearm - Plastic bag

Where a defendant moved to suppress a firearm found by the police in a plastic bag, it was error for a judge to deny the motion because the search of the plastic bag was too far removed in time and place from the defendant's arrest to constitute a contemporaneous search incident to arrest.

*Commonwealth v. Pierre (Lawyers Weekly No. 10-038-09) (2 pages) (Rescript) Case tried before Brennan, J., in the District Court. Kenneth Bresler for the commonwealth; Lisa M. Kavanaugh for the defendant (Docket No. SJC-10329) (March 12, 2009).*

### Patfrisk

Where a defendant filed a suppression motion, arguing that two Springfield police officers conducted an impermissible patfrisk of him, an order allowing the motion must be reversed because the police conduct was proper under the circumstances.

*Commonwealth v. Johnson (Lawyers Weekly No. 10-115-09) (8 pages) (Botsford, J.) Motion to suppress evidence heard by Teahan, J., in District Court. Rose E. King for the defendant; Sidney E. Reavey for the commonwealth (Docket No. SJC-10267) (June 26, 2009).*

### Patfrisk - Drug dealer

Where a jury convicted a defendant of possession of cocaine with intent to distribute in a school zone, the conviction must be set aside on the ground that evidence seized by the police was inadmissible.

*Commonwealth v. Gomes (Lawyers Weekly No. 10-055-09) (15 pages) (Spina, J.) (Cowin, J., dissenting) Motion to suppress evidence heard by Brady, J., and case tried before Donovan, J., in Superior Court. Dale Marie Merrill and Dana Alan Curhan for the defendant; Lynn D. Brennan and Philip B. O'Brien for the commonwealth; David M. Siegel, for Suffolk Lawyers for Justice, amicus curiae, submitted a brief (Docket No. SJC-10255) (April 2, 2009).*

### Personal belongings left on roadside

Where a Superior Court judge allowed a defendant's motion to suppress a gun found in a bag the defendant had left at the side of a public road, there was no unconstitutional search and thus the suppression order must be reversed.

*Commonwealth v. Nattoo (Lawyers Weekly No. 10-001-09) (9 pages) (Ireland, J.) Motion to suppress evidence heard by Rup, J., in Superior Court. Frederic G. Bartmon, of Allison, Angier & Bartmon, for the defendant; Judith Ellen Pietras for the commonwealth; Lisa Kavanaugh, Committee for Public Counsel Services, amicus curiae, submitted a brief (Docket No. SJC-10163) (Jan. 6, 2009).*

### Stranded vehicle - Dog sniff - Consent

Where a dog sniff of a temporarily disabled motor vehicle yielded discovery of heroin and cocaine within the vehicle, the evidence should not have been ordered suppressed, as a police request for consent to the sniff did not amount to a seizure.

*Commonwealth v. Mateo-German (Lawyers Weekly No. 10-087-09) (21 pages) (Cowin, J.) (Ireland, J., with whom Marshall, C.J. and Botsford, J., join, dissenting) Motion to suppress heard by Rufo, J., in Superior Court. Garrett R. Fregault and Steven E. Gagne for the commonwealth; David Keighley for the defendant (Docket No. SJC-10126) (May 21, 2009).*

### Suitcase

Where a District Court judge allowed two defendants' motion to suppress evidence discovered during a warrantless search of their apartment, the judge acted permissibly based on a finding that the defendants had not abandoned a suitcase, which police officers found in the defendants' apartment, when the defendants denied that it was theirs.

## SEARCH AND SEIZURE

Continued from page 39

Order allowing suppression motion affirmed.

*Commonwealth v. Augello (and a companion case) (Lawyers Weekly No. 10-192-08) (1 page) (Rescript) Suppression motion heard by Vrabel, J., in the District Court.*

### Unlawful seizure of individual

Where a Boston Municipal Court judge ordered suppressed (1) all evidence found on a narcotics defendant's person by Boston Housing Authority police officers and (2) any statements he may have made to them, the suppression order must be affirmed in light of evidence that the defendant was unlawfully seized without a warrant in violation of his state and federal constitutional rights.

*Commonwealth v. Lyles (Lawyers Weekly No. 10-083-09) (10 pages) (Spina, J.) Pre-trial suppression motion heard by Coyne, J.; application for leave to prosecute an interlocutory appeal allowed by Cowin, J., in the Supreme Judicial Court for the county of Suffolk and the case was transferred by her to the Appeals Court; after review by the Appeals Court, Supreme Judicial Court granted leave to obtain further judicial review. Macy Lee for the commonwealth; Chrystal A. Murray and Mary F. Norton for the defendant; David M. Siegel submitted an amicus curiae brief for Suffolk Lawyers for Justice, Inc. (Docket No. SJC-10271) (May 15, 2009).*

### Warrant - 'No-knock' provision

Where a residence was searched pursuant to a "no-knock" warrant, evidence obtained thereby should have been admitted because there was probable cause that an announced search would put the safety of the officers at risk.

Suppression order reversed.

*Commonwealth v. Santiago (Lawyers Weekly No. 10-191-08) (13 pages) (Cordy, J.) (Cowin, J., concurring) (Ireland, J., with whom Marshall, C.J., and Botsford, J., join, dissenting) Motion to suppress evidence was heard by McDonald, J., in Superior Court. Bethany C. Lynch for the commonwealth; Thomas F. McGuire for the defendant (Docket No. SJC-10117) (Nov. 17, 2008).*

### Warrantless sweep

Where a judge granted a defendant's suppression motion, the judge acted properly based on a finding that the evidence was obtained as the result of an impermissible second warrantless sweep of the defendant's home.

*Commonwealth v. Peters (Lawyers Weekly No. 10-082-09) (12 pages) (Gants, J.) Pre-trial suppression motion heard by Nickerson, J.; application for leave to prosecute an interlocutory appeal allowed by Ireland, J., in the Supreme Judicial Court for the county of Suffolk and the case was transferred by him to the Appeals Court; after review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review. Barry P. Wilson and Michelle L. Brennan for the defendant; Julia K. Holler and Robert D. Moriarty for the commonwealth (Docket No. SJC-10269) (May 15, 2009).*

## TAXATION

### Corporate excise tax

Where the commonwealth desires to impose a corporate excise tax on a foreign corporation that does not have a physical presence in Massachusetts, the commonwealth may do so, consistent with the commerce clause of the U.S.

Constitution, provided that the foreign corporation's activities in Massachusetts have established a substantial nexus with the commonwealth.

*Geoffrey, Inc. v. Commissioner of Revenue (Lawyers Weekly No. 10-005-09) (15 pages) (Spina, J.) Appealed from a decision of the Appellate Tax Board. Paul H. Frankel and Maxwell D. Solet, of Mintz Levin, for the plaintiff; Thomas A. Barnico for the defendant (Docket No. SJC-10106) (Jan. 8, 2009).*

### Corporate subsidiary - Liquidation

Where the Appellate Tax Board held that the tax-free liquidation of all assets owned by a wholly-owned subsidiary into its parent corporation did not effect a 'disposition' of those assets triggering the recapture of investment tax credits against the state corporate excise tax, the Commissioner of Revenue's appeal from that holding must be rejected.

*Commissioner of Revenue v. The Gillette Company (Lawyers Weekly No. 10-098-09) (12 pages) (Cowin, J.) Appealed from a decision of the Appellate Tax Board. Kenneth W. Salinger for the Commissioner of Revenue; John S. Brown, Matthew D. Schnall and Donald-Bruce Abrams, all of Bingham McCutchen, for the taxpayer (Docket No. SJC-10298) (June 11, 2009).*

## Justice Ralph D. Gants



Appointed to SJC: 2009

Will reach retirement age: 2024

Majority opinions written this year: 11

Concurring opinions written this year: 1

Concurring in part opinions written this year: 2

**Notable decision:** *Commonwealth v. Swartz* (Lawyers Weekly No. 10-125-09), which ruled constitutional a guideline permitting a vehicle initially stopped at a sobriety checkpoint to be diverted to a secondary screening where the relevant officer has a reasonable suspicion, based on articulable facts, that the driver has committed a drunk-driving violation or another violation of law

### Financial institution excises

Where the commonwealth desires to impose financial institution excises on financial institutions that do not have a physical presence in Massachusetts, the commonwealth may do so consistent with the Federal commerce clause of the U.S. Constitution if the financial institutions at issue engage in activities in Massachusetts establishing a substantial nexus with this commonwealth.

*Capitol One Bank, et al. v. Commissioner of Revenue (Lawyers Weekly No. 10-004-09) (20 pages) (Spina, J.) Appealed from a decision of the Appellate Tax Board. John S. Brown, Matthew D. Schnall and Donald-Bruce Abrams, all of Bingham McCutcheon, for the plaintiffs; Thomas A. Barnico for the defendant; Shirley K. Sicilian and Sheldon H. Laskin submitted a brief for Multistate Tax Commission, amicus curiae; Todd A. Lard, Frederick J. Nicely and Kathleen King Parker, of Pierce Atwood, submitted a brief for Council on State Taxation, amicus curiae (Docket No. SJC-10105) (Jan. 8, 2009).*

### LLC - Charitable exemption

Where limited liability companies operating nursing homes sought a "charitable organization" tax exemption, that request was correctly denied by the Appellate Tax Board.

"We conclude that an entity organized as a LLC does not come within the definition of a 'charitable organization,' for purposes of G.L.c. 59, §5, Third, and that a 'charitable organization' must occupy real property for the property to be considered for a tax exemption. ..."

*CFM Buckley/North, LLC v. Board of Assessors of Greenfield (Lawyers Weekly No. 10-041-09) (12 pages) (Marshall, C.J.) Appealed from a decision of the Appellate Tax Board. Daniel E. Will, of Devine, Millinet & Branch, for the taxpayers; Rosemary Crowley, of Doherty, Wallace, Pillsbury & Murphy, for Board of Assessors of Greenfield and another; Janet S. Petkun, for Board of Assessors of Quincy, was present but did not argue (Docket Nos. SJC-10174, 10175 and 10176) (March 16, 2009).*

### Retirement system - LLC

Where the board of assessors of Billerica assessed real and personal property taxes against Middlesex Retirement System, LLC, for fiscal years 2004 through 2006, the assessments should be affirmed as to the real property but vacated as to the personal property.

*Middlesex Retirement System, LLC v. Board of Assessors of Billerica (Lawyers Weekly No. 10-053-09) (15 pages) (Spina, J.) Appealed from the Appellate Tax Board. Stephen W. DeCoursey and John M. Lynch,*

use taxes against a vendor in circumstances such as these.

*Town Fair Tire Centers, Inc. v. Commissioner of Revenue (Lawyers Weekly No. 10-150-09) (15 pages) (Marshall, C.J.) Appealed from a decision of the Appellate Tax Board. David J. Nagle and William E. Halmkin, both of Sullivan & Worcester, for the plaintiff; David A. Guberman for Commissioner of Revenue; Deborah B. Weissbard and Glenn A. Perlow, for State of New Hampshire, amicus curiae, submitted a brief; Kathleen King Parker, of Pierce Atwood, Frederick J. Nicely and Todd A. Lard, for Council on State Taxation, amicus curiae, submitted a brief (Docket No. SJC-10360) (Aug. 25, 2009).*

## TORT

### SLAPP - Rape accusation - Interlocutory appeal

Where a plaintiff, against whom a rape charge was dismissed, brought suit against the defendant, who accused him of rape, and her codefendant parents, the complaint should have been dismissed pursuant to the anti-SLAPP statute.

*Benoit v. Frederickson, et al. (Lawyers Weekly No. 10-113-09) (15 pages) (Ireland, J.) (Cordy, J., with whom Marshall, C.J., and Botsford, J., join, concurring) Special motion to dismiss heard by Murphy, J., in Superior Court. Krista Green Pratt and C.J. Eaton, both of Seyfath Shaw, for the defendants; Stephen J. Gordon for the plaintiff; Richard J. Yurko, of Yurko, Salvesen & Remz, and Sarah R. Wunsch, for American Civil Liberties Union of Massachusetts, amicus curiae, submitted a brief (Docket No. SJC-10187) (June 25, 2009).*

### SLAPP - South Boston Community Development Foundation

Where a complaint against the owners and operators of a convention center was dismissed, the dismissal was proper based on the applicability of G.L.c. 231, §59H (the "anti-SLAPP" statute).

*North American Expositions Co. Limited Partnership, et al. v. Corcoran, et al. (Lawyers Weekly No. 10-002-09) (29 pages) (Cowin, J.) Special motion to dismiss heard by van Gestel, J., in Superior Court. Robert E. McLaughlin Sr. and Michael Eby, both of Gilman, McLaughlin & Hanrahan, for the defendants; Howard M. Cooper and Edward Foye, both of Todd & Weld, for the plaintiffs (Docket No. SJC-10118) (Jan. 7, 2009).*

## UNEMPLOYMENT COMPENSATION

### Appeal - Postmark rule

Where an employee's appeal to the Board of Review of the Division of Unemployment Assistance was postmarked before, but not received by the board until after, the 30-day statutory appeals period had expired, the appeal was timely.

A District Court decision, denying the employer's motion to dismiss the appeal, is affirmed.

*Pavian, Inc. v. Hickey, et al. (Lawyers Weekly No. 10-178-08) (11 pages) (Marshall, C.J.) Case heard by Welsh, J., in District Court. David Hadas for Division of Unemployment Assistance; T. Richard McIntosh and Margaret Monsell for the defendant; John C. Crenney for the plaintiff; Patti A. Prunhuber and Monica Halas, for Employment Rights Coalition and others, amici curiae, submitted a brief (Docket No. SJC-10112) (Oct. 29, 2008).*

*both of Lynch DeSimone & Nysten, for the taxpayer; Patrick J. Costello, of Louison, Costello, Condon & Pfaff, for board of assessors of Billerica (Docket No. SJC-10268) (March 31, 2009).*

### Sales tax - Certificate of public convenience and necessity

Where a transportation company claimed a sales tax exemption for buses pursuant to G.L.c. 64H, §6(aa), that claim was correctly rejected on the ground that the buses had been purchased prior to the company's receipt of a certificate of public convenience and necessity under G.L.c. 159A, §7.

*AA Transportation Company, Inc. v. Commissioner of Revenue (Lawyers Weekly No. 10-102-09) (12 pages) (Cowin, J.) Appealed from a decision of the Appellate Tax Board. William E. Halmkin and Richard L. Jones, both of Sullivan & Worcester, for the plaintiff; Jennifer Grace Miller for the defendant (Docket No. SJC-10257) (June 12, 2009).*

### Use tax - Out-of-state sales

Where the Commissioner of Revenue assessed use tax and related penalties against Town Fair for failing to collect use taxes on tire sales in New Hampshire to Massachusetts residents, we conclude that the applicable Massachusetts statutes do not permit the commonwealth to assess

## WILLS AND TRUSTS

### Limitations - Imputed knowledge

Where (1) a plaintiff administrator of a will commenced a civil action alleging that the defendant misappropriated funds from the estate and (2) the defendant was awarded summary judgment based on the fact that his sister became aware of facts necessary to trigger the statute of limitations more than three years prior to the suit, the judgment must be reversed on the ground that the sister's knowledge may not be imputed to the estate.

*Heavey v. Maloof* (Lawyers Weekly No. 10-028-09) (9 pages) (Spina, J.) Case heard by Donovan, J., on a motion for summary judgment. Bruce A. Kraft, of Heavey, Houlihan, Kraft & Cardinal, for the plaintiff; Karen Friedman for the defendant (Docket No. SJC-102990) (Feb. 20, 2009).

### Limitations -

#### Redemption of trust shares

Where (1) a complaint was filed alleging that the defendants breached their fiduciary duties to their children in connection with the redemption of shares in a family business and (2) a judge found that the claims were not time-barred, that ruling must be affirmed in part and reversed in part.

*O'Connor, et al. v. Redstone, et al.* (Lawyers Weekly No. 10-185-08) (37 pages) (Marshall, C.J.) Case heard by van Gestel, J., on a motion for summary judgment. William H. Narwood, of Connecticut (Mark E. Swirbalus and William Shields III, both of Day Pitney, with him) for the plaintiffs; Michael B. Keating, Elisa K. Nethercott and Jeffrey S. Follett, of Foley Hoag, for Sumner M. Redstone and another; Howard J. Castleman, of Holland & Knight, for Edward S. Redstone (Docket No. SJC-10080) (Nov. 7, 2008).

#### Power of appointment

Where trustees commenced a declaratory judgment action arguing that under the terms of the trust, the settlor's late son, the holder of a power of appointment, could validly appoint his share of the trust property in further trust for the benefit of his spouse and issue, as he did in his will, the trustees' request must be denied on the ground that no actual controversy exists.

*Linehan, et al. v. Linehan, et al.* (Lawyers Weekly No. 10-068-09) (3 pages) (Rescript) Case reported by Botsford, J., sitting as single justice. Robert J. Morrill, of Gilmore, Rees & Carlson, for the plaintiffs (Docket No. SJC-10303) (April 28, 2009).

#### Reformation - Drafting mistakes

Where a trustee has sought reformation of the trust, that request should be allowed in light of full, clear, and decisive proof that mistakes in drafting rendered the trust inconsistent with the donor's intent.

*Dwyer v. Dwyer, et al.* (Lawyers Weekly No. 10-220-08) (3 pages) (Rescript) Case reserved and reported by Botsford, J., sitting as single justice. Barbara Freedman Wand and Harry F. Lee, both of Bingham McCutchen, Susan E. Stenger and Peter Zupcofska, both of Burns & Levinson, for the plaintiff, submitted a brief (Docket No. SJC-10202) (Dec. 31, 2008).

#### Reformation request

Where trustees have requested the reformation of certain trusts, we hold that their request should be denied because they have

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not demonstrated that the trusts, as written, will produce tax results that are clearly inconsistent with the settlor's tax objectives.

*Fierst, et al., trustees, v. Laird, et al.* (Lawyers Weekly No. 10-069-09) (2 pages) (Rescript) Appealed from a decision issued by Greaney, J., sitting as single justice. Deborah L. Anderson and Sarah T. Connolly, both of Nixon Peabody, for the plaintiffs (Docket No. SJC-10338) (April 28, 2009).

#### Reinstatement of time-barred claims against estate

Where a single justice reinstated claims against a decedent's estate that had been dismissed as untimely, the reinstatement order was consistent with "justice and equity" and thus should be upheld.

*Gates, et al. v. Reilly, et al.* (Lawyers Weekly No. 10-051-09) (19 pages) (Cordy, J.) Case heard by Spina, J., sitting as single justice. Frank P. Muzio, of the Law Offices of Robert W. Welch, for the defendants; Andrew R. Berman and David H. Abbott, both of Simonds, Winslow, Willis & Abbott, on appeal for the plaintiffs (Docket No. SJC-10088) (March 24, 2009).

## WORKERS' COMPENSATION

#### Average weekly wages - Insured and uninsured employers

Where a worker was injured while employed by a company that lacked workers' compensation insurance coverage, his average weekly wages, for purposes of workers' compensation benefits, should include wages concurrently earned from an insured employer.

*Sellers Case* (Lawyers Weekly No. 10-217-08) (16 pages) (Marshall, C.J.) Appeal from a decision of the Industrial Accident Reviewing Board. Paul H. Nugent, of Nugent & Nugent, for the employee; David A. Guberman for Workers' Compensation Trust Fund; Mary Jane McKenna, of Gallagher & Cavanaugh, and J. Michael Conley, of Kenney & Conley, submitted a brief for Massachusetts Academy of Trial Attorneys, amicus curiae (Docket No. SJC-10195) (Dec. 19, 2008).

#### Emotional and mental injury compensation

Where the Industrial Accident Reviewing Board concluded that §1(7A) of the Workers' Compensation Act (G.L.c. 152), which defines the term "personal injury," does not require a greater "work-relatedness" nexus for emotional and mental injury compensation than is required for physical injury compensation under §26, we hold that the Board acted permissibly and that its decision should be affirmed.

*Cosmo Bisazza's Case* (Lawyers Weekly No. 10-194-08) (11 pages) (Cordy, J.) Appealed from a decision of the Industrial Accident Reviewing Board. Vincent F. Massey for the employer; Louis deBenedictis for the employee (Docket No. SJC-10183) (Nov. 20, 2008).

#### Exclusivity - Wrongful death

Where a decedent's parents commenced an action under the wrongful death statute, G.L.c. 229, §2, seeking recovery for loss of consortium and punitive damages from the successor in interest to the store where the decedent worked at the time of his death, the complaint was correctly dismissed based on the exclusivity provision of the Workers' Compensation Act, G.L.c. 152, §24.

*Saab, et al. v. Massachusetts CVS Pharmacy, LLC* (Lawyers Weekly No. 10-190-08) (13 pages) (Marshall, C.J.) Motion to dismiss heard by Brassard, J., in Superior Court. Richard P. Campbell and Christopher A. Callanan, both of Campbell, Campbell, Edwards & Conroy, for the plaintiffs; William J. Dailey Jr. and Myles W. McDonough, both of Sloane & Walsh, for the defendant; John Pagliaro, Martin J. Newhouse and Jo Anne Shotwell Kaplan, for New England Legal Foundation and another, amicus curiae, submitted a brief (Docket No. SJC-10193) (Nov. 13, 2008).

#### 'Final decision' - Average weekly wage

Where (1) a decision by a Department of Industrial Accidents reviewing board was later amended by the board and then vacated in part by this court and (2) the board subsequently treated the original decision as the "final decision" for purposes of G.L.c. 152, §51A, the board correctly applied the statute and thus its ruling should be affirmed.

*Walker's Case* (Lawyers Weekly No. 10-037-09) (10 pages) (Marshall, C.J.) Appealed from a decision of the Industrial Accident Reviewing Board. Paul M. Moretti, of Curtin, Murphy & O'Reilly, for the employee; Kathleen A. Moore-Kocot for the employer (Docket No. SJC-10236) (March 10, 2009).

## ZONING

#### Special permit - Lapse

Where a Land Court judge ruled that the plaintiffs' special permit had lapsed, we hold that the judge erred, as the plaintiffs had prevented the special permit from lapsing by beginning construction of one phase of a condominium project within the one-year period provided by state law and a local bylaw.

*Lobisser Building Corporation, et al. v. Planning Board of Bellingham* (Lawyers Weekly No. 10-111-09) (17 pages) (Marshall, C.J.) Case heard by Long, J., on motion for summary judgment. Thomas O. Moriarty and Katherine G. Brady, both of Marcus, Errico, Emmer & Brooks, for the plaintiffs; Jason R. Talerman and Lynnea Thody, both of Blatman, Bobrowski & Mead, for the defendant; James M. Burgoyne, of Fletcher, Tilton & Whipple, and Charles N. LeRay, of Brennan, Dain, LeRay, Weist, Torpy & Garner, submitted a brief for The Abstract Club, et al., amicus curiae; Charles A. Perkins Jr., of Perkins &

*Ancil, and Andrew C. Oatway and Adam P. Whitney, both of Morisi & Oatway, submitted a brief for Community Associates Institute, amicus curiae; Howard M. Brown, of Bartlett Hackett Feinberg, and Stephen V. Saia submitted a brief for Frank R. Saia, amicus curiae* (Docket No. SJC-10316) (June 22, 2009).

#### Special permit - Variance

Where a Superior Court judge ordered the Billerica board of appeal to modify a special permit and variance previously issued, the judge acted correctly given the board's failure to proffer support for its refusal to modify the permit/variance.

*Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica, et al. (and a companion case)* (Lawyers Weekly No. 10-128-09) (25 pages) (Marshall, C.J.) Case heard by McEvoy, J., in Superior Court. Patrick J. Costello, of Louison, Costello, Condon & Pfaff, for the defendant; James T. Dangora Jr., of Shea, Dangora & Nelson, for the plaintiff (Docket No. SJC-10354) (July 24, 2009).

#### Subdivision control

Where plaintiffs, who are trustees of real estate trusts owning land in the town of Aquinnah, filed suit (1) seeking to use and enjoy their property in accordance with the local bylaw and health regulations in effect at the time that they filed preliminary subdivision plans for the land and (2) seeking a declaration that the Martha's Vineyard Commission's designations of two "districts of critical planning concern" (DCPCs) were invalid, we hold that a judge correctly entered summary judgment for the defendant town of Aquinnah and a number of codefendants.

In issuing today's opinion, we decide: that the plaintiffs were not entitled to either an eight-year zoning freeze under G.L.c. 40A, §6, fifth par. or a three-year freeze on board of health regulations under G.L.c. 111, §127P; and that the plaintiffs' challenge to the DCPS designations was untimely.

*Kitras, trustee, et al. v. Zoning Administrator of Aquinnah, et al.* (Lawyers Weekly No. 10-030-09) (19 pages) (Spina, J.) Case heard by Houston, J., on motions for summary judgment. Arthur P. Kreiger, of Anderson & Kreiger, for the plaintiffs; Ronald H. Rappaport, of Reynolds, Rappaport & Kaplan, for the defendant town of Aquinnah; Eric W. Wodlinger, of Rackemann, Sawyer & Brewster, for the defendant Martha's Vineyard Commission; Benjamin Fierro III, of Lynch & Fierro, submitted a brief for Home Builders Association of Massachusetts, Inc., amicus curiae (Docket No. SJC-10223) (Feb. 20, 2009).

#### Variance - Lapse

Where a landowner failed to record a dimensional variance in the registry of deeds within one year of its issuance, the variance lapsed.

*Cornell v. Board of Appeals of Dracut, et al.* (Lawyers Weekly No. 10-089-09) (10 pages) (Spina, J.) Case heard by Sands, J., on motions for summary judgment, and a motion to alter or amend the judgment heard by him. Justin Perrotta for the plaintiff; James P. Hall and Raymond T. Weicker, both of Qua, Hall, Harvey & Walsh, for the defendants; Ilana M. Quirk, of Kopelman & Paige, submitted a brief for Massachusetts Chapter of the American Planning Association, amicus curiae (Docket No. SJC-10307) (May 22, 2009).